TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 93

CHARLESTON, SOUTH CAROLINA, MINING AND MANUFACTURING COMPANY, APPELLANT,

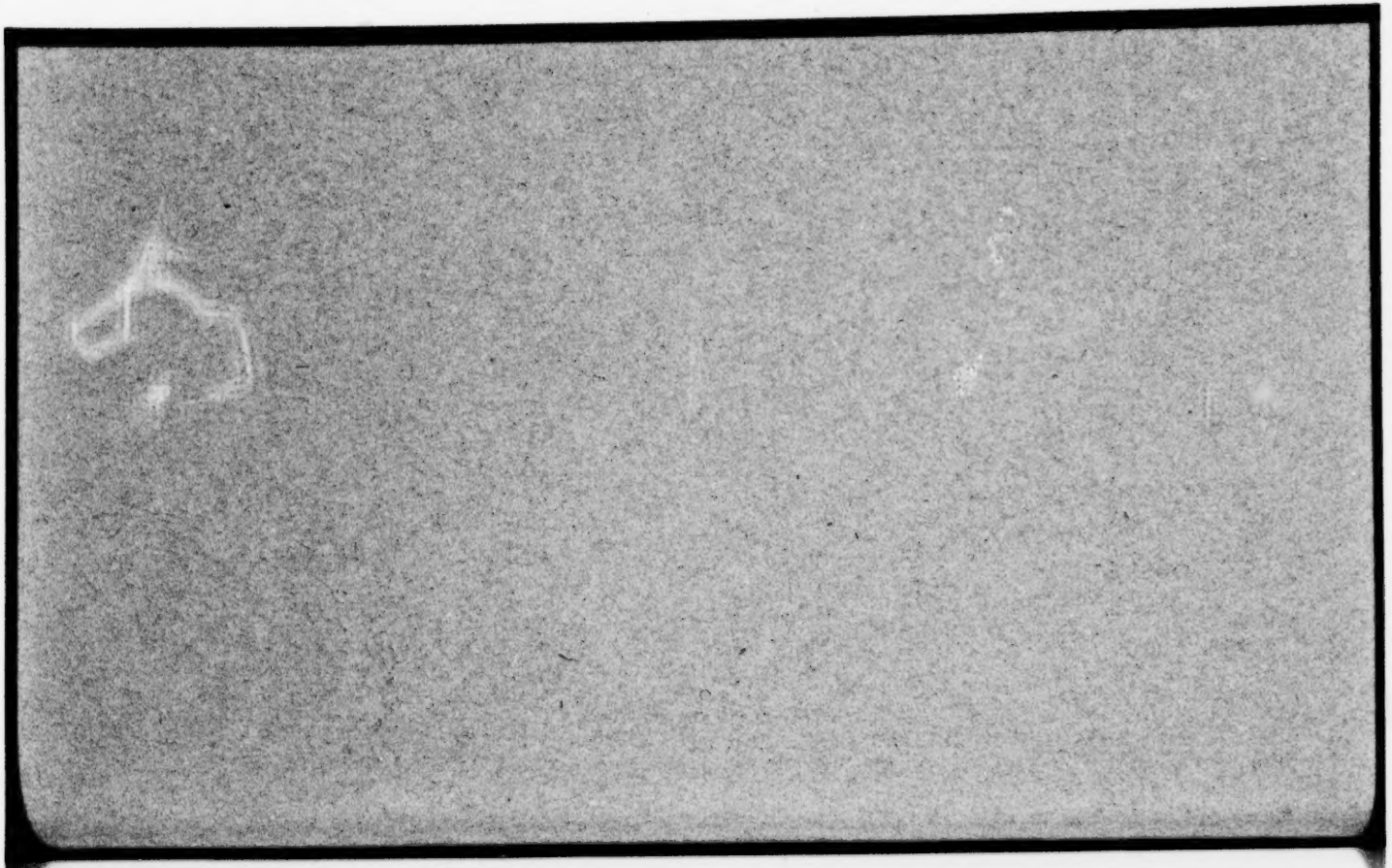
vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED MAY 1, 1926

(31,107)



(31,107)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 407

CHARLESTON, SOUTH CAROLINA, MINING AND MANUFACTURING COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 6, 1925

[fols. a & b] [Caption omitted]

[fol. 1] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

DOCKET ENTRIES

On October 13, 1914, the Complainant filed its original Bill of Complaint in said cause.

On October 13, 1914, Chancery Subpoena was duly issued, and service thereof made on the defendant on October 26, 1914.

On November 13, 1914, the Defendant filed its answer in said cause.

On December 22, 1914, Order of Reference was entered in said cause to R. C. Dowling, Special Examiner.

On April 7, 1915, Agreement and Order extending time for taking testimony was filed in said cause.

On August 2, 1915, the Special Examiner, R. C. Dowling filed his report in said cause.

On September 6, 1916, the Court rendered its Final Decree, and same was filed February 26, 1917.

On March 13, 1917, Entry of Appeal to the Fifth Circuit Court of Appeals and order allowing Appeal was filed in said cause.

On January 21, 1918, Mandate from the Fifth Circuit Court of Appeals, reversing the Decree of September 6, 1916, was filed in said cause.

[fol. 2] IN UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff,

versus

CHARLESTON, S. C., MINING & MANUFACTURING COMPANY, A CORPORATION, and the Central Trust Company of New York, a Corporation, Defendants.

BILL OF COMPLAINT—Filed March 6, 1918

To the Honorable Judge of the District Court of the United States in and for the Southern District of Florida:

The United States of America, by H. S. Phillips, United States Attorney for the Southern District of Florida, acting under the authority and pursuant to the direction of the Attorney General of the United States, and by leave of this Court, files this, its amended bill of complaint, against the Charleston, S. C., Mining and Manufacturing Company, a corporation, and the Central Trust Company of New York, defendants herein, and alleges:

I

That the defendant Charleston, S. C., Mining and Manufacturing Company is a corporation organized and existing under the laws of the State of South Carolina and doing business in the State of Florida, and within this district, that the defendant, the Central Trust Company of New York, is a corporation organized and existing under the laws of the State of New York.

[fol. 3]

II

That on and prior to February 19, 1906, the plaintiff was the owner, as a part of its public domain, of the following described tracts of land, situated in Polk County, Florida, to-wit: the East half (E½) of the Southwest Quarter (S. W. ¼) and the Northwest Quarter (N. W. ¼) of the Southeast Quarter (S. E. ¼) of Section 19 and the North half (N. ½) of the Northwest Quarter (N. W. ¼), and the North half (N. ½) of the Southwest Quarter (S. W. ¼), and the Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼) of Section 30, all in Township 32 South, Range 26 East of the Tallahassee Meridian, which said lands were at that time chiefly valuable for the phosphate deposits contained therein and were subject to disposal by the plaintiff only under its laws providing for the disposal of lands valuable for phosphate.

III

That on or about February 19, 1906, the State of Florida by its Selecting Agent B. F. Hampton filed in plaintiff's local land office at Gainesville, Florida, indemnity school selection lists Nos. 147 and 148, embracing the lands above described, pursuant to the provisions of sections 2275 and 2276 of the Revised Statutes as amended, under which the State of Florida was entitled to select in lieu of school lands which had been lost to it in place, other agricultural lands of the United States, and was not authorized to select lands valuable for phosphate or other minerals; and in support of said selection lists there were filed the affidavits executed by one J. E. Hollings-[fol. 4] worth, in which it was alleged that the affiant was well acquainted with the character of said lands, with each and every legal subdivision thereof, and that there was not to his knowledge within the limits thereof any valuable mineral deposits, and that said lands were essentially non-mineral lands and that the selections in support of which the affidavits were filed were not made for the purpose of fraudulently obtaining title to mineral land but with the object of securing such land for agricultural purposes; that by reason of the filing of said school indemnity selection lists and the non-mineral affidavits aforesaid plaintiff's Secretary of the Interior was induced to approve the selection of said lands, which approval was granted on December 11, 1907, in approval list No. 31, a certified copy of which was forwarded to the Governor of the State of Florida by the Commissioner of the General Land Office on December 18,

1907; that by reason of said selection, approval and certification, the State of Florida claim to have acquired the legal title to said lands, and thereafter, to-wit, on or about February 8, 1908, the State Board of Education of the State of Florida executed a deed conveying said lands to the said Charleston, South Carolina, Mining and Manufacturing Company, party defendant, herein, and the said Charleston, S. C., Mining and Manufacturing Company now claims to be vested with full title to said lands.

IV

Plaintiff avers that the representations made in support of the State's selections aforesaid were wholly false, fraudulent and untrue and were made and instigated by and on behalf of the Charleston, S. C., Mining and Manufacturing Company for the purpose of de-[fol. 5] ceiving the officials of the plaintiff's land department and without any belief on the part of the said company, or anyone acting in its behalf, that the said statements and representations, or any parts thereof, were true; that in truth and in fact the said lands at and prior to the time of their selection as aforesaid contained valuable deposits of phosphate, which in fact constituted the chief value of said lands, and that that fact was at that time and prior thereto well known to the Charleston, S. C., Mining and Manufacturing Company, which company desired said lands only because of their value for the phosphate deposits contained therein; that the officials of plaintiff's land department were misled and deceived by the said false, fraudulent and untrue representations and statements so made by and on behalf of the said Charleston, S. C., Mining and Manufacturing Company, and because of such deception and fraud were induced to allow, approve and certify the selections in the manner and form hereinbefore alleged; all of which actions, doings and pretenses of the said defendant are contrary to equity and good conscience and tend to the manifest injury and oppression of the plaintiff in the premises.

V

The plaintiff avers that none of its officers or agents became informed or received any notice whatever of the fraud by which it had been unlawfully deprived of its title to said lands in the manner aforesaid, until during the year 1916, and that since first receiving notice of this fact, it has been diligently prosecuting investigations to ascertain the true situation.

[fol. 6] VI

That it appears that on April 1st, 1909, said Charleston, S. C., Mining and Manufacturing Company executed to the Central Trust Company of New York a blanket mortgage on all of the property claimed or belonging to the said Charleston, S. C., Mining and Manufacturing Company, to secure the payment of fifteen million dollars, fifteen-year, five per cent gold bonds, dated November 2, 1908, payable December 1, 1923, bearing interest from November 21, 1908,

and that by reason of said mortgage, the said Central Trust Company, party defendant herein, has or claims to have some right and interest in the lands hereinbefore described as subsequent purchaser or mortgagee or otherwise, as will more fully appear by reference to mortgage record book 37 in the office of the clerk of the Circuit Court in and for Polk County, Florida; that by reason of the mortgagee's knowledge of the business conducted by the said defendant, Charleston, S. C., Mining and Manufacturing Company, the said mortgagee is charged with full knowledge of all the fraudulent acts and representations of the said Charleston S. C., Mining and Manufacturing Company, and otherwise had full knowledge of the fraud and false representations aforesaid.

1st Prayer.—Wherefore, the plaintiff prays that the approval granted by plaintiff's Secretary of the Interior, and the deed executed by the said Board of Education of the State of Florida to the said Charleston, S. C., Mining and Manufacturing Company conveying the title to said lands, may be declared null and void, set aside, revoked and held for naught and be delivered up and surrendered [fol. 7] by the said defendant, Charleston S. C., Mining and Manufacturing Company for cancellation; that the said described lands may be adjudged and decreed to be the perfect property of the plaintiff, free and clear of all claims of the said defendants or any one claiming by, through or under them and that the said defendants may be finally and perpetually enjoined from setting up any claims to the said lands or any parts thereof and from creating any cloud upon plaintiff's title to the same, and that possession thereof may be restored to the plaintiff.

2nd Prayer.—Plaintiff further prays that in the event the Court finds the Central Trust Company, party defendant herein, took said mortgage in good faith, for value received and without notice, that the amount of said mortgage lien, principal and interest be ascertained by and under the direction of the Court and that the Mortgagor, the Charleston, S. C., Mining and Manufacturing Company, party defendant herein, be required within a time to be limited by the Court to discharge the same; that in default of the satisfaction of said mortgage by said Charleston, S. C., Mining and Manufacturing Company, in compliance with the terms of the order that the Court may make herein, judgment for the full amount of the mortgage lien as to the lands involved in this suit be decreed in favor of the United States, plaintiff herein, and against the said Charleston, S. C., Mining and Manufacturing Company, and that execution issue thereon against the property of the said mortgagor and that the proceeds of such execution, if any, be applied to the payment of said mortgage lien; and that thereupon the said mor-gagee be forthwith and forever restrained and enjoined from setting up or asserting any [fol. 8] claims or rights, privileges, benefits or advantages under and by reason of said mortgage and that the same be declared to be null and void, as to the lands hereinbefore described.

3rd Prayer.—Plaintiff further prays that in the event the Court finds that said mortgagee took said mortgage in good faith for value

and without notice, and further finds that said mortgagee shall not be satisfied by either of the methods hereinbefore indicated, that the Court, without decreeing that the approval of plaintiff's Secretary of the Interior and the deed of the Board of Education of the State of Florida to the said defendant Charleston, S. C., Mining and Manufacturing Company be cancelled, may enter a decree that the lands be sold and the proceeds paid into the registry of the Court for the payment and satisfaction of such part of said mortgage debt as may be ascertained is secured by said lands, and that the remainder of said proceeds, if any, be paid into the Treasury of the United States;

4th Prayer.—And for such other and further relief as may seem just to this Honorable Court and agreeable to equity and good conscience.

H. S. Phillips, United States Attorney for the Southern District of Florida.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE DEFENDANT CHARLESTON, S. C., MINING AND MANUFACTURING COMPANY—Filed May 4, 1918

Come now Charleston, S. C., Mining and Manufacturing Company, a corporation, one of the Defendants herein, by its solicitors, Wilson & Swearingen and William Wade Hampton and William Wade Hampton, Jr., and files this its separate answer to the Amended Bill of Complaint filed herein by the Plaintiff, and says:

1. This Defendant admits that it is a corporation as alleged, doing business in the State of Florida and within the Southern District of Florida, and that the Central Trust Company is a corporation, as alleged.

2. This defendant admits that on and prior to February 12th, 1906, the Plaintiff was the owner, as a part of its public domain, of the property described in said Amended Bill of Complaint; but this Defendant positively denies the allegation that the said lands were at that time chiefly valuable for phosphate deposits contained therein, [fol. 10] and denies that they were subject to disposal by the Plaintiff only under its laws providing for the disposal of land valuable for phosphate. On the contrary, this Defendant avers that the said lands were vacant, unappropriated, public lands, for homestead entry, and subject to script location; that the said lands were offered, having been surveyed, *sed*ignated and classed by the Government and its officials as "agricultural lands."—having been offered on April 21, 1879, and had been on the market continuously since that time; offered to the public as agricultural lands, subject to disposal under the Homestead Laws of the United States, as aforesaid.

3. This defendant admits that on or about February 12, 1906, (not February 19, 1906, as alleged by Plaintiff in its bill) the State of Florida, by its Selecting Agent, B. F. Hampton, filed in Plaintiff's local Land Office at Gainesville, Florida, Indemnity School Selection Lists Nos. 147 and 148, embracing the lands described in Plaintiff's Amended Bill of Complaint, pursuant to the provisions of sections 2275 and 2276 of the Revised Statutes as amended, under which the State of Florida was entitled to select in lieu of school lands which had been lost to it in place, other agricultural lands of the United States. Defendant admits that the State Agent was not authorized to select lands known to be valuable for phosphate or other minerals, if of such quantity and quality as to justify their extraction as minerals.

This defendant admits that in support of said selection lists there were filed the affidavits executed by one J. E. Hollingsworth, known as non-mineral affidavits, in which it was alleged that the affiant was well acquainted with the character of said land, with each and every [fol. 11] subdivision thereof, and that there was not to his knowledge within the limits thereof any valuable mineral deposit, and that said lands were essentially non-mineral lands, and that the selections in support of which the affidavits were filed were not made for the purpose of fraudulently obtaining title to mineral land but with the object of securing such land for agricultural purposes; that by reason of the filing of said school indemnity selection lists and the non-mineral affidavits aforesaid plaintiff's Secretary of the Interior was induced to approve the selection of said lands, which approval was granted on December 11, 1907, in approval list No. 31, as alleged; that by reason of said selection approval and certification, the State of Florida claimed to have acquired the legal title to said lands, and thereafter, on the 8th of February, 1908, the State Board of Education of the State of Florida executed a Deed conveying said lands to the said Charleston, S. C., Mining & Manufacturing Company, and the Charleston, S. C., Mining and Manufacturing Company now claims to be vested with full title to said lands. Defendant further avers that the said selection on the part of the State's Agent was made in good faith and in the usual, ordinary, customary, accepted and approved manner, strictly in accordance with the regulations and requirements of the Land Department of the United States Government, and the non-mineral affidavits were made by a disinterested party in the usual and customary manner, strictly in accordance with the rules and regulations of the Interior or Land Department of the Government; and in accordance with the rules and regulations of the Interior Department and without any knowledge of the existence of mineral deposits, the State duly conveyed the said property, as [fol. 12] aforesaid, to this Defendant for valuable consideration, as it had a right to do, and this defendant claims title to the said property as the legal grantee of the State of Florida.

4. This defendant denies the following allegation in the 4th paragraph of the Amended Bill, to-wit: "Plaintiff avers that the representations made in support of the State's selections aforesaid were wholly false, fraudulent and untrue and were made and instigated by

and on behalf of the Charleston, S. C. Mining and Manufacturing Company for the purpose of deceiving the officials of the Plaintiff's Land Department and without any belief on the part of the said company, or any one acting in its behalf, that the said statements and representations, or any parts thereof, were true; but this Defendant avers that the representations made in support of the State's selection were true in every particular; that the said lands were vacant, unappropriated, offered public lands, subject to homestead entry and subject to the scrip entry, surveyed, set apart, and specifically classed by the Plaintiff from 1879 to the date of its selection and location by the State's Agent, as aforesaid, as "agricultural lands," and had never been known or heard of, so far as this Defendant is advised, as anything other than agricultural lands. Neither this Defendant, or any of its officers, made or instigated any representations of any kind to the State's Agent as to the character and quality of the lands, or made any false, fraudulent, or untrue statements in regard to the character of the said land, either to the State's Agent or to any one else. That at the time and date of the said selection, this Defendant did not know and had no knowledge of any mineral character of the said land, nor any information upon which to have predicated any belief [fol. 13] that the lands contained minerals; but on the contrary, this Defendant and its officers honestly believed that the said lands were agricultural lands, as they had been designated and classed by the Government, and accepted the Government's designation and classification as "agricultural lands" but did not make any statements or representations to the State's agent, or to any authorities of the State. But this defendant learning that the lands were subject to homestead entry and subject to scrip location, and that they appeared so upon the records of the United States Government at Washington and at Gainesville, and that they could be purchased from or through the State, in the usual and customary manner applied to Mr. B. F. Hampton, the State's Agent, for the securing of the said lands. That the State's Agent, in the usual and customary manner, secured a representative to make the usual and customary examination as to whether the lands disclosed any mineral deposits, and having had this examination made, located the lands,—this Defendant having no knowledge of when or how the location was made; and after the lands were certified to the State of Florida, in the due, legal and customary manner, this Defendant in good faith, without any knowledge of the existence of any mineral deposits in the lands, purchased the lands from the State's Agent, and the State's Agent in the usual and customary manner in the disposition of the public lands in the State of Florida, had the State Board of Education of the State of Florida, for valuable consideration, to convey the said property directly to this Defendant,—this Defendant paying for the property in accordance with its contract and agreement with the State's Selecting Agent. [fol. 14] This Defendant denies the following allegation in the 4th paragraph of said Amended Bill, to-wit: "that in truth and in fact the said lands at and prior to the time of their selection as aforesaid contained valuable deposits of phosphate, which in fact constituted the chief value of said lands, and that that fact was at that time and

prior thereto well known to the Charleston, S. C., Mining & Manufacturing Company, which Company desired said lands only because of their value for the phosphate deposits contained therein; that the officials of plaintiff's land department were misled and deceived by the said false, fraudulent and untrue representations and statements so made by and on behalf of the said Charleston, S. C. Mining & Manufacturing Company, and because of such deception and fraud were induced to allow, approve and certify the selections in the manner and form hereinbefore alleged." But this Defendant avers the truth to be that at, and prior to, the time of the selection of the said lands, the same did not contain valuable deposits of phosphate which constituted its chief value. On the contrary, Defendant avers that said land does not in fact contain valuable deposits of phosphate of a quality and quantity that would justify its extraction; that the quality of the deposits of phosphate under this land are shown by the Government's own investigation and analysis to be of such a low grade as to have no market value, the same is not a merchantable phosphate, and there has never been known to be any sale of phosphate in the State of as low grade as that contained in this land; there has never been any mining operations in the vicinity of this land, even up to the present time; there were no known mines in that vicinity, nor was there any evidence of the existence of any phosphate [fol. 15] under this land, and this Defendant did not desire the said lands for their phosphate deposits; it did not purchase them as phosphate lands, nor with the purpose or intention of using the same for mining purposes, but purely and simply because the lands were in the vicinity of other lands owned by this Defendant and Defendant needed the property for business purposes, in connection with other properties owned there by this Defendant. Defendant did not know and does not believe and does not now believe that said lands are valuable for phosphate deposits, did not know that they contained any phosphate or other mineral deposits when Defendant acquired title thereto. This Defendant did not mislead the Plaintiff's Land Department and did not deceive the Land Department by any false, fraudulent and untrue representations and statements, for that this Defendant did not make any false, fraudulent, or untrue representations and statements, and did not deceive, or commit any fraud to induce the Land Department to allow, approve, and certify the selection; but this Defendant is an innocent purchaser in good faith and for value, from the State of Florida, honestly and conscienciously believing at the time that it purchased the said property that the State had a right to convey the same and to make good title thereto. And this Defendant, as soon as it acquired its title, openly and above board and without any concealment or deception, and without any fraud or wrong on its part or on the part of any of its agents or employees, promptly filed its deed from the State Board of Education of the State of Florida for record, and had the same placed upon record in the office of the Clerk of the Circuit Court of Polk County, Florida, on the 21st of March, A. D. 1908; and thereby this Defendant in good faith became vested with the legal title to and for [fol. 16] the said property described in Plaintiff's Amended Bill.

5. This Defendant knows nothing as to the allegations contained in the 5th paragraph of Plaintiff's Amended Bill, and therefore neither admits nor denies the same.

6. This Defendant admits that on April 1st, 1909, the said Charleston, S. C. Mining & Manufactacturing Company executed to the Central Trust Company of New York a mortgage covering a large amount of property of and belonging to the Charleston, S. C., Mining and Manufacturing Company, to secure the payment of Fifteen Million ($15,000,000.00) Dollars, fifteen-year, five per cent gold bonds, dated November 2, 1908, payable December 1st, 1923, bearing interest from November 1, 1908, and that by reason of said Mortgage the said Central Trust Company has rights and interests in the lands described in the Plaintiff's Bill, as a subsequent purchaser or mortgagee, as will more fully appear by reference to the record of the Mortgage in Mortgage Record Book 37, in the office of the Clerk of the Circuit Court in and for Polk County, Florida, beginning at page 1,—said Mortgage filed for Record April 29, 1910,—and that the same is an existing lien upon and against the said property and other property of this Defendant; but denies that it is a blanket mortgage on all of the property of this Defendant, and avers that the bonds issued *unatil* said Mortgage are unpaid. But this Defendant denies the allegations that by reason of the well known mineral character of the said lands and of the mortgagee's knowledge of the business conducted by the said Defendant Charles- [fol. 17] ton, S. C., Mining and Manufacturing Company, said mortgagee is charged with full knowledge of all the fraudulent acts and representations of the said Charleston, A. C. Mining and Manufacturing Company, and otherwise had full knowledge of the fraud and false representations aforesaid.

This Defendant submits that the said mortgage, Central Trust Company, could not have had knowledge of any fraudulent acts and representations of this Defendant, for that this Defendant did not commit any fraudulent act or acts and did not make any false or fraudulent representation or representations of any character, and was not guilty of any fraud, deceit, or wrong of any character; but on the contrary, this Defendant was and is a bona fide purchaser of the said property from the State of Florida, for valuable consideration, in good faith, and without any knowledge of the existence of phosphate contained in the said property and without knowledge of any wrong or fraud done or committed by any one.

This Defendant submits that the Plaintiff has not made out a case against this Defendant in a Court of equity, and is not entitled to have the said Deed of this Defendant cancelled, nor to interfere with the title of this Defendant, and is not entitled to have any of the relief prayed for in either prayer of the Plaintiff's Amended Bill as against this Defendant or the said Central Trust Company.

And pursuant to the provisions of equity Rule 29, this Defendant saves, reserves and insists upon the following points of law, and moves to dismiss plaintiff's bill upon the following grounds, to-wit:

[fol. 18] 1st. It does not appear in and by the allegations of the said Amended Bill that the lands set forth in said Amended Bill of Complaint contained mineral deposits of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end, at the time of the alleged selection and location by the State of Florida.

2nd. It does not appear from the allegations of the Amended Bill that either the State Agent, B. F. Hampton, or J. E. Hollingsworth, had any knowledge of the alleged mineral deposits contained in said lands.

3rd. It does not appear from the allegations of the Amended Bill that there was any want of good faith, nor was there any fraud, or intention of fraud, either on the part of the State's Agent, B. F. Hampton, in making the selection and location, or of J. E. Hollingsworth in making the alleged non-mineral affidavit, either at the time of making the same, or at any time up to the 8th of February, 1908, when the property was conveyed by the State Board of Education to the Defendant, Charleston, S. C., Mining and Manufacturing Company.

4th. It does not appear what representations made in support of the State's selection were false, fraudulent and untrue.

5th. It does not appear what statements and representations were made and instigated by and on behalf of the Charleston, S. C., Mining & Manufacturing Company, for the purpose of deceiving the officials of the Plaintiff's Land Department, and without any belief on the part of the Company, or any one acting in its behalf, that [fol. 19] the said statements and representations, or any parts thereof, were true.

6th. It does not appear in and by the Amended Bill of Complaint that this Defendant, or any of its authorized agents or employees, made any definite statement or representations of any character, prior to, or at the time of the selection or location of the lands by the State's Agent.

7th. It does not appear from the allegations of the Bill that this Defendant Company, or any of its authorized agents, had any connection with, or interest in the location of the said lands by the State authorities.

8th. It does not appear that this Defendant Company, or any of its authorized agents or employees, made any definite statement or representations of any character, prior to, or at the time of the selection or location of the lands by the State's Agent.

9th. The Amended Bill does not disclose any connection between this Defendant Company, its agent or employees, and the officials of the State Government.

10th. There is no specific act of deception or fraud on the part of the Defendant, Charleston, S. C., Mining and Manufacturing Com-

pany, or its authorized officers or employees, inducing the officials of the Government to allow, approve and certify the selections made by the State authorities, alleged in said Bill.

11th. It does not appear from the allegations of the Amended Bill that the defendant, Central Trust Company of New York, had [fol. 20] any knowledge, actual or constructive, of any deception or fraud or misrepresentation on the part of the Charleston, S. C., Mining & Manufacturing Company, in inducing the said State's selection.

12th. It does not appear from the allegations of the Bill what knowledge, if any, the Central Trust Company had of the business conducted by the defendant, Charleston, S. C., Mining & Manufacturing Company.

13th. It does not appear from the allegations of the Bill either that the Charleston, S. C., Mining & Manufacturing Company committed any fraudulent acts or representations, nor does it appear that the Central Trust Company had any knowledge, actual or constructive, of any fraudulent act or acts, representation or representations, on the part of the Charleston, S. C., Mining & Manufacturing Company.

14th. The Bill assumes, without allegation, a specific averment that the defendant, Central Trust Company, had full knowledge of fraudulent acts and representations of the defendant, Charleston, S. C., Mining & Manufacturing Company, without any allegation even of the commission of such fraudulent or false representations.

15th. Plaintiff has not made such allegations as would entitle it to the relief prayed for in the first prayer of the Amended Bill.

16th. If the Court finds that the Central Trust Company took the Mortgage in good faith, for value received and without notice, then [fol. 21] a Court of equity has no power to disturb that mortgage, or to take any accounting in relation to the same, but the only remedy of the Plaintiff would be a Bill for redemption after the maturity of the mortgage lien.

17th. If the Court should find that the Defendant, Central Trust Company, is an innocent holder, a Court of equity has no power to have an accounting and to require the defendant, Charleston, S. C., Mining & Manufacturing Company, to discharge the Mortgage; nor has a Court of equity power to issue an execution against this defendant for the amount of the mortgage lien.

18th. The second prayer of the Plaintiff's Amended Bill is multifarious and impossible of performance, and exceeds the power of a Court of equity.

19th. The third prayer is impossible of performance, and exceeds the power of a Court of equity. If the defendant, Central Trust Company of New York, is an innocent holder for value, a Court of equity has no right to disturb its title.

20th. If the Central Trust Company is an innocent holder, a Court of equity has no power to decree the sale of the land and to pay the

proceeds into the registry of the Court for the payment and satisfaction of the mortgage debt, save and except upon the foreclosure of the *Mortgagee* [Mortgage] by the Mortgagee.

21st. The prayers of the Plaintiff are contrary to the elemental principles of equity jurisprudence, and unprecedented in equity practice, and the Plaintiff is not entitled to the relief prayed for against either of the Defendants.

[fol. 22] 22nd. The Amended Bill seeks to cancel the title of the State of Florida and the title made by the State of Florida to the defendant, Charleston, S. C., Mining & Manufacturing Company, the grantee of the State of Florida, and the State of Florida is not a party to the suit.

23rd. The State of Florida is an essential party to this suit in order to properly dispose of the rights and interests of the State in the property involved in the suit as disclosed by the Bill.

Wherefore this Defendant prays to be hence dismissed with its costs in this behalf most wrongfully sustained.

Charleston, S. C. Mining & Manufacturing Co., by S. T. Morgan, President. Attest: J. F. McGrath, Secretary. (Corporate Seal.) Wilson & Swearingen, W. W. Hampton, W. W. Hampton, Jr., Solicitors for Defendant, Charleston, S. C., Mining & Manufacturing Company.

[fol. 23] Sworn to by S. T. Morgan et al. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

On June 3, 1918, the Defendant Central Trust Company filed its separate answer in said cause.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ON MOTION TO DISMISS—Filed May 14, 1924

This cause coming on to be heard upon the motion of the defend-
[fol. 24] ant, Charleston, S. C., Mining & Manufacturing Co., to dismiss the amended bill of complaint; and the same having been submitted;

It is thereupon ordered, adjudged and decreed that the 2nd and 3rd prayers of said amended bill be and the same are hereby stricken.

Done this May 13th, 1924, as of May 29th, 1919.

Rhydon M. Call, Judge

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF DEFENDANT CHARLESTON, S. C., MINING CO. TO AMEND ANSWER—Filed April 6, 1924

To the Honorable Judge of the District Court of the United States, in and for the Southern District of Florida:

Comes now the defendant, Charleston, S. C. Mining & Manufacturing Company, by its attorneys, after the Court has dismissed the bill as to the Central Trust Company of New York, and moves the Court for leave to amend the Answer of this Defendant by striking out in the 3rd paragraph of the Answer, on page 2 thereof, at the [fol. 25] beginning of the 16th line, the word "agricultural" and the following part of said paragraph, to-wit: "Defendant admits that the State Agent was not authorized to select lands known to be valuable for phosphate or other minerals, if of such quantity and quality as to justify their extraction as minerals." And by adding the following words in lieu thereof, to-wit:

"Defendant avers that the School Grant to the State of Florida was made by act of Congress March 3, 1845 (U. S. Stat. at Large, Vol. 5, page 788), which created a compact between the State of Florida and the United States of America prior to the discovery of minerals in the State of Florida, and prior to enactment of any laws in relation thereto by the Congress of the United States, and that the same was predicated upon a valuable consideration, and the State of Florida was not and is not restricted in the selection of any lands unappropriated and not disposed of by the United States of America and located within the State of Florida, and the rights of the State of Florida cannot be interfered with, either by any Department of the Federal Government or by the Courts; and it was not material whether the lands contained prosphate deposits or not. And further, that the said Act or compact was passed by Congress many years before the discovery of phosphate and before phosphate deposits were recognized as being a mineral deposit, and the subsequent legislation of the Federal Government can in no way affect or defeat the legal rights of the State of Florida acquired under and by said compact."

This Motion is made immediately upon the ruling of the Court dismissing the Bill as to the Central Trust Company, mortgagee. And Defendant's counsel move the Court to allow a reasonable time to [fol. 26] have the defendant, Charleston, S. C., Mining & Manufacturing Company to sign the amendment to the Answer under the corporate seal of the said corporation, and to verify the same in accordance with the rules.

This 16th day of April, A. D. 1924.

W. W. Hampton, W. W. Hampton, Jr., E. B. Hampton, Attorneys for defendant Charleston, S. C. Mining & Manufacturing Co.

Leave granted as prayed for. Rhydon M. Call, Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER OF DEFENDANT, CHARLESTON, S. C., MINING AND MANUFACTURING COMPANY—Filed April 29, 1924

Comes now the Defendant, Charleston, S. C., Mining & Manu- [fol. 27] facturing Company, a corporation, by its attorneys, and by leave of the Court first had and obtained, files this its Amendment to the third paragraph of the Answer filed herein by this Defendant to the Amended Bill of Complaint of the Plaintiff, on page 2 thereof, at the beginning of the 19th line, by striking out the word "agricultural", and by striking out the following part of said paragraph, to-wit: "Defendant admits that the State Agent was not authorized to select lands known to be valuable for phosphate or other minerals, if of such quantity and quality as to justify their extraction as minerals", and by making an addition thereto, so that the said Amended Paragraph III of said Answer shall read as follows, to-wit:

3. This Defendant admits that on or about February 12, 1906, (not February 19, 1906), as alleged by Plaintiff in its Bill, the State of Florida, by its Selecting Agent, B. F. Hampton, filed in Plaintiff's local Land Office at Gainesville, Florida, Indemnity School Selection Lists Nos. 147 and 148, embracing the lands described in Plaintiff's Amended Bill of Complaint, pursuant to the provisions of Section 2275 and 2276 of the Revised Statutes as amended, under which the State of Florida was entitled to select in lieu of school lands which had been lost to it in place, other lands of the United States. Defendant avers that the School Grant to the State of Florida was made by Act of Congress March 3, 1845, (U. S. Stat. at Large, Vol. 5, page 788), which created a compact between the State of Florida and the United States of America prior to the discovery of minerals in the State of Florida and prior to enactment of any Laws in relation thereto by the Congress of the United States, and that the same was predicated upon a valuable consideration, [fol. 28] and the State of Florida was not and is not restricted in the selection of any lands unappropriated and not disposed of by the United States of America and located within the State of Florida, and the rights of the State of Florida cannot be interfered with, either by any Department of the Federal Government or by the Courts; and it was not material whether the lands contained phosphate deposits or not. And further, that the said Act or compact was passed by Congress many years before the discovery of phosphate and before phosphate deposits were recognized as being a mineral deposit, and the subsequent legislation of the Federal Government can in no way affect or defeat the legal rights of the State of Florida acquired under and by said compact.

This Defendant admits that in support of such selection lists there were filed the affidavits executed by one J. E. Hollingsworth, known as non-mineral affidavits, in which it was alleged that the

affiant was well acquainted with the character of said land, with each and every subdivision thereof, and that there was not to his knowledge within the limits thereof any valuable mineral deposit, and that said lands were essentially non-mineral lands and that the selections in support of which the affidavits were filed were not made for the purpose of fraudulently obtaining title to mineral land but with the object of securing such land for agricultural purposes; that by reason of the filing of said School Indemnity lists and the non-mineral affidavits aforesaid plaintiff's Secretary of the Interior was induced to approve the selection of said lands, which approval was granted on December 11, 1907, in approval list No. 31, as alleged; that by reason of said selection, approval and certification, the State of Florida claimed to have acquired the legal title to said lands, and [fol. 29] thereafter on the 8th of February, 1908, the State Board of Education of the State of Florida executed a Deed conveying said lands to the said Charleston, S. C. Mining & Manufacturing Company, and the Charleston, S. C. Mining & Manufacturing Company now claims to be vested with full title to said lands. Defendant further avers that the said selection on the part of the State's Agent was made in good faith, and in the usual, ordinary, customary, accepted and approved manner, strictly in accordance with the regulations and requirements of the Land Department of the United States Government, and the non-mineral affidavits were made by a disinterested party in the usual and customary manner, strictly in accordance with the rules and regulations of the Interior or Land Department of the Government; and in accordance with the rules and regulations of the Interior Department and without any knowledge of the existence of mineral deposits, the State duly conveyed the said property, as aforesaid, to the Defendant for valuable consideration, as it had a right to do, and this Defendant claims title to the said property as the legal grantee of the State of Florida.

And this Defendant alleges in all other particulars as it hath already alleged in its Answer to the Amended Bill of Complaint heretofore filed herein.

Charleston, S. C., Mining & Manufacturing Co., by J. F. McGrath, Vice-President. (Corporate Seal.) Attest: S. [fol. 30] T. Morgan, Jr., Asst. Secretary. W. W. Hampton, W. W. Hampton, Jr., E. B. Hampton, Attorneys for Defendant.

Sworn to by J. F. McGrath, et al.; jurat omitted in printing.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPOINTING SPECIAL EXAMINER—Filed Aug 2, 1920

The foregoing cause coming on upon motion of the United States Attorney to appoint an examiner to take the testimony in said cause

on the pleadings as amended, and the Court being fully advised in the premises, it is upon consideration thereof,

Ordered that Governor Hutchinson, Esquire, be and he is hereby appointed Special Examiner in said cause, and is hereby directed to proceed to take the testimony submitted by the respective parties and report the same to this Court in accordance with the rules of practice in such case made and provided.

Done and ordered this 2nd day of August A. D. 1920.

Rhydon M. Call, U. S. District Judge.

In United States District Court

Minute Entry

On May 1, 1921, the Defendant Central Trust Company filed its Amended and Supplemental Answer in said cause.

[fol. 32] In United States District Court

[Title omitted]

Notice of Filing Condensed Statement of Evidence—June 12, 1924

The Plaintiff and its Attorney will take notice that we have this day lodged and filed in the Office of the Clerk of the U. S. District Court for the Southern District of Florida, a condensed statement of the evidence adduced in this cause before R. C. Dowling, Special Examiner, and re-filed with Gov. Hutchinson, Special Examiner, and including the evidence adduced before Special Examiner, Gov. Hutchinson,—being at the same time of the filing of the Praecipe for the making up of the Transcript of Record,—and we append hereto a true copy of said Statement of the Testimony for examination

And you will further take notice that on Monday, the 15th day of June, A. D. 1924, at 11:30 A. M. of said day, or as soon thereafter as counsel can be heard, the defendant (Appellant) by its counsel [fol. 33] will present said condensed statement of the evidence adduced in said cause to Hon. R. M. Call, Judge of the U. S. District Court for the Southern District of Florida, and move for due certification thereof in accordance with the rules. And at the same time and place will move before the said Judge for an Order directing the Clerk of the said District Court to transmit to the United States Circuit Court of Appeals, at New Orleans, Louisiana, the original exhibits attached to the Special Examiner's Report in this cause, to be used before the said Circuit Court of Appeals in the argument of said cause by counsel for the respective parties, and by the Appellate Court in the consideration of same, to-wit:

Complainant's Exhibits "A" and "B."

Defendant's exhibit "C" (being Deed of State Board of Education of Florida to Charleston, S. C., Mining & Manufacturing Company, dated February 8, 1908); Defendant's Exhibit "No. 1" (being photographic copies of the following papers: Certificate of B. F. Hampton, State Selecting Agent for the State of Florida, of date February 19, 1906; Certificate of B. F. Hampton, State Selecting Agent, appointing J. E. Hollingsworth as his agent to make personal examination of the land, dated February 5, 1906; Affidavit of J. E. Hollingsworth that the land is not within six miles of a mining claim, entry or location, dated March 3, 1906; Non-Mineral Affidavit of J. E. Hollingsworth, dated March 3, 1906; List of Indemnity School Selection by B. F. Hampton, State Agent, dated February 12, 1906; Record of filing and approval of List No. 147 General Land Office, Washington, D. C.; Certificate of B. F. Hampton of the basis used in List 147, dated February 12, 1906; B-2 Certificate [fol. 34] of Appointment of J. E. Hollingsworth by B. F. Hampton, State Selecting Agent, February 5, 1906; B-3 Affidavit J. E. Hollingsworth dated March 3, 1906; B-4 Non-Mineral Affidavit J. E. Hollingsworth dated March 3, 1906; B-5 List 148, Indemnity School Selection by B. F. Hampton, State Selecting Agent, dated February 19, 1906; B-6 Certificate List 148 Land Office; C-1 Approval of List December 11, 1907; C-1½ Letter of the Commissioner certifying approval of List 31, dated December 11, 1907; C-1½ Certificate from the U. S. Land Office December 11, 1907; C-2 Approval of List 31 School Indemnity lands; C-4 Certificate of Approval by the Commissioner of the General Land Office, December 11, 1907).

And at the same time and place will move the Court for such other and further order as may be proper in the premises.

W. W. Hampton, W. W. Hampton, Jr., E. B. Hampton, Wilson & Swearingen, Attorneys for Defendant (Appellant).

To Hon. W. M. Gober, U. S. District Attorney, and Harry W. Reinstine, Asst. U. S. District Atty., Solicitors of Record for Complainant (Appellee).

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence—Filed June 16, 1924

STIPULATIONS RE TESTIMONY.

The following stipulation of counsel pertaining to the refiling of the testimony heretofore taken in this cause before the filing of the Amended Bill herein was entered into in writing, to-wit:

[Title omitted]

Whereas there has been change in the pleadings in this cause since the case was remanded by the Circuit Court of Appeals and [fol. 36] a new party added, viz: Central Trust Company of New York; and whereas the parties desire to facilitate the conclusion of this cause and to save expense of re-taking of the testimony of the several witnesses heretofore examined, but desire to use the testimony of said witnesses so far as the same may be applicable to the issues under the now existing pleadings, viz:

E. R. Childers, Mortimer H. Sears, J. J. Singleton, J. H. Pratt, J. C. Thompson, R. C. Langford, A. E. Parker, J. W. Cole, Will Bowen, Jr., P. C. Parish, Thomas Best, Witnesses for Plaintiff.

E. Francis Hyde, E. C. Stewart, J. J. Singleton, G. T. Hill, W. A. Evans, J. E. Hollingsworth, J. H. Minor, J. H. Pratt, B. F. Hampton, W. H. Lewis, C. L. Marshall, Leon Prince, P. E. Jenkins, Witnesses for Defendant.

It is therefore agreed by and between counsel for the respective parties hereto, that the testimony of the said several witnesses as the same appears in and by the notes of the Examiner who took and transcribed the testimony, may be re-filed in the cause by either party hereto; subject, however, to the right of either party to except to any part of said testimony, or any question or answer, and the right to move to strike such part or parts of the testimony, as though the same had been made at the time of the taking of the said testimony—these objections or motions to strike to be made in writing and filed with the Examiner or Special Master at the time the said testimony is re-offered.

[fol. 37] It being the true intent of this stipulation that neither party shall be prejudiced by this consent to refile the said testimony, or any part thereof, but shall have the same right to object to any part of the evidence, either question or answer, as though the same had been made and presented at the time the witness was examined, and as though the witness had been re-examined at said sitting or hearing.

Provided that either party hereto may take and file any other or additional testimony as they may be advised, in accordance with Equity Rules.

At Tampa, Fla., this 28th day of September, A. D. 1920.

H. S. Phillips, United States District Attorney for the Southern District of Florida, for Plaintiff. Wilson & Swearingen, Hampton & Hampton, Attorneys for Charleston, S. C., Mining & Manufacturing Co. Wilson & Swearingen, Hampton & Hampton, Larkin & Perry, Attorneys for Central Trust Company of New York.

Mr. E. R. Childers, a material witness for the plaintiff, testified as follows, to-wit:

My name is E. R. Childers. I am quite familiar with the lands which the Government seeks to cancel the patent for, described as fol- [fol. 38] lows: East half of Southwest quarter, and Northwest quarter of Southeast quarter of Section Nineteen, and North half of the Northwest quarter, North half of the Southwest quarter, and Southeast quarter of Southeast quarter of Section Thirty,—all in Township Thirty-two, South of Range Twenty-six East. I live at Fort Meade and own lands adjoining the lands described in the Bill of Complaint. I bored through them, inspecting them. Never went through them with the regular borings; that is, I did not weigh it and try it out like I did on my own lands. In examining those lands I found that they contained what we call "drift phosphate," and it was mostly in sand. Around on the edges of it would be in clay and sand. I examined the lands with augurs boring down about eighteen feet before you strike it, and then hit it, and then go on and bore with a pump and an augur. I had a small two inch augur and bored a hole about eighteen inches deep and struck phosphate deposit. I did not bore very many. I bored enough to convince me that there was a perfect deposit of rock. I have been in the business so long, I don't do much boring to satisfy myself. I commenced examining lands for phosphate about 1888; kept it up right continuously until a few years ago. Am sixty-five years old. My operations for examining of land for phosphate were confined to Northwest of Fort Meade and Southeast of Fort Meade, and on down. I have run lines down in there thirty-five and forty miles right on a line. I found those lands in crossing that land running that line. I made a geological survey under Dr. Pratt. I found that that phosphate bearing strata was sand and clay, a varying amount of concretion in it, and I found that was universal. For instance you take it go here and there, and here (indicating) and coming [fol. 39] down here (indicating), that is all just good soil, and then you strike that phosphate. I cannot explain that I found a deposit of phosphate and the directions. The first work I did over there I run a line Southeast and commenced just up above that and went down to the Big Charlie Apopka Creek. I bored this land and got this sand in pebble and it indicated that there was phosphate in there. In one sense it is evidence of phosphate similar to evidence found on other lands adjoining, and around that same territory. In another sense it was not. In some places you find clay, but was not original formation deposit, and then again you find it pure white sand. I cannot tell the extent of the phosphate deposit in these lands. I did not weigh the rock. I was just going across to see that it was rock. I thought it was a deposit of sufficient quantity to warrant the mining of it, but as I told you, I did not take it out and weigh it and wash it. That was the opinion I had from the examination I made. It would depend upon what you call minable whether there was sufficient to warrant me in saying that the deposit was of a sufficient quantity as to be minable. The only thing I can say is, that is phosphate land. There is no question about it. But I never saw two holes exactly alike in my life,

and I never saw quantities exactly alike. I have found qualities very similar. I think there was enough phosphate to warrant going in there and digging it out profitably, but I am not certain of that. Now there is a part of that land down in Section Thirty, it would be the East Half of the Northeast Quarter of the Southeast Quarter of Section Thirty, that I did not think there is any rock to amount to anything. On that particular place right in there I put one bor- [fol. 40] ing on it and saw what I was into, and quit. Mr. Singleton was on the ground and I was with him. I tried to get him to go and bore that land and he would not do it. I refer to Capt. J. J. Singleton. He was agent for the defendant company. He was out there prospecting and stayed out there a month. I had a communication with the Secretary of the Virginia-Carolina Chemical Company about these lands, Mr. S. D. Crenshaw. He had been down there. Now some years previous to this purchase from the company I was awful hard up and could not sell a piece of land.—could not get anybody interested. They could not be bought for any other use, but they contained phosphate. I didn't know Mr. Chisholm at that time. Knew him in January and February, 1906, at the time he made the purchase. He said he was agent for the Virginia-Carolina Chemical Company. I do not know. He held himself out to be such agent. I think I discussed these lands with Mr. Chisholm at that time, I don't really know. I cannot recall any conversation about these lands with Mr. Chisholm. My conversation about these lands was with Captain Singleton. He and I went in the woods a month and lived right together all the time. He was agent for Chisholm, and I suppose come down there, he did the boring. He did all the prospecting. I knew him as the Company's agent prospecting the lands for phosphate. He was boring over in Section Thirty about one hundred or one hundred and fifty yards from the line of the Government land, and the augur went on down pretty deep. I was not present when the boring was done, but my report showed they found the rock in ten feet. That would be in the Northeast corner of the Northeast Quarter of Section Thirty, I think that is the way it was; no, the Northeast Quarter of Northwest Quarter. The line run right down through the [fol. 41] center. I would not go, I could not get on the Government land at all. I told him about these strips and that I had been wanting to get hold of them. I do not know now whether I wrote him all about it or not. Someone had that strip and I told Mr. Singleton about it. I asked him to go on and he would not do it, showing that he was having the proposition. That was all there was in that. All I tried to do, as I understand it, was to get Captain Singleton, who was the agent of the Company in prospecting the land, to go and bore these particular lands. He didn't do it. I told him the report I had about that particular boring and the rock was only ten feet, whereas it was eighteen feet where he was boring over the land that he did buy. I told Captain Singleton I was satisfied that it did have phosphate deposits from the borings I had made on there, and I thought he ought to bore. I didn't know that they

were running a gum game on me. He didn't say anything to amount to anything, just evaded everything. It was an evasion all the way through. It was just this way: I had located this Government land and I thought I was entitled to a part of them, and it used to be the ruling of the Court that I was,—rules of the Department—and when I gave that information away, I ought not to have allowed those men to go down there. If I had known they would slip in there behind me and knock me out, not only in that but on there lands holding tax deeds that the land was sold. I never analyzed any of this rock. It was like all the other lands though.

On cross-examination the witness testified:

I did not have any of this rock analyzed at all, but I know the [fol. 42] analysis of all the rock around there as an average. I was with Dr. J. H. Pratt when he went to analyze the rock. Him and I agreed to have them stored in three parts, white rock, black rock, and brown rock, and they was all mixed in a pile out of one boring. I wanted to do that business because I did not want to spend so much money analyzing it, and I would have a pretty fair idea then what I was entitled to from the qualities of those rocks, and when I got them I would keep a sample of them, and after that any time I would be boring in there I would know I was in a, b or c. A and b went sixty-five and sixty-four, and the real white rock went up to seventy-three, and I could just find out from that. I was studying the thing off hand all along when I was working there, particularly in there, that was my business was to hunt this rock. I did not analyze the rock, I didn't have to do it. I didn't even weigh it. I just bored into it to see whether it was there or not.

Defendant's counsel propounded the following question to the witness:

"Q. As I understand, you are now trying to defeat this Company from getting these lands because you discovered the lands and they would not let you have them?

A. Well, that wasn't exactly it. One sense it is."

I am the man, sir, who reported to the Government the fact that these lands were phosphate lands and am responsible for the institution of this suit. In one sense it is because of my ill feeling to the company for the reason that they got the land when I was entitled to it; and in another sense it was that I didn't think they [fol. 43] ought to be taking Government lands and one thing and another which I was refused. I refused to take it with scrip. If you will examine the records in Washington you will find it there, that I did look upon it as highway robbery. I had a good deal of correspondence with the Government in regard to these lands. I wanted to know if I could get them with that scrip and they told me they would put me in the penitentiary if I did. The General Land Office told me this. Here is what I wrote to them.

Defendant's counsel propounded the following question to the witness:

"Q. Well, didn't you make threats after this comany acquired these lands? Didn't you make threats to a number of people that you would see that they didn't get these lands?

A. I felt it. I don't know whether I said it or not. I expect I have openly boasted of the fact that I proposed to keep them from getting these lands. The average analysis of phosphate lands in this territory is 57 to 72. I believe it is 67 to 52. I was just feeling of them to see if they were on the market for buying anything. That was years ago. I knew he wasn't going to buy any lands he had to put any money in. The Virginia-Carolina Chemical Company bought a little land from me, and then took a little. They paid me for what they bought. My conversation with Captain Singleton was in 1906. I think that was the time he went on it. I could not tell you how many conversations; we were out about thirty days together and just talking all the time. He would not bore this land. I bored half a dozen or more, I just skipped [fol. 44] about over them. I bored in the land described in this Bill situated in Section Nineteen about three or four holes. I bored over the eastern part,—no, the western part. I didn't go by the acres, I just went over the territory. The first line of borings I ever made there was the year before that. In order to determine whether a tract of land has phosphate, when I am just prospecting over the land, I just go across over it first, examine the land, examine the timber growth, and I put down a hole on variations of land and timber. My object is to see whether that stratum of phosphate or bearing material is injured at all. I bore right on down until I strike what they call bed rock. That gives me a good idea of what this tract of land has got. Then I go over to another class of land and bore on that, do the same thing, and half a dozen borings I have got a couple of hundred acres, and it will satisfy me whether there is rock or not. I don't have to find rock every time to know rock is there. I want to know if that stratum underneath there bears this pebble. My experience and the experience of every man who has been in business long, is that if you find that matrix there is rock. You may not find any rock at all hardly where you put that hole down, but right over there you will find it. That is my experience in the matter. Down in that territory is just a blanket formation. I have forty acres there in section thirty. I have bored that pretty well. I found rock everywhere on it. I am talking about my own land. The land described in the bill is very near all the same thing. I cannot say just how many I did bore on the Government's land.

Defendant's counsel propounded the following question to the witness:

[fol. 45] "Q. The lands described here are the north half of the northwest quarter, and north half of the southwest quarter, and the southwest quarter of the southeast quarter of section thirty, town-

ship thirty-two, range thirty-six, what portion of that land did you bore?

A. Only made one boring, I don't know whether that was exactly on the line or not, running out of that pond down there, it would be about the northeast of the northwest, right up near a pond there. I found a good bed of rock there. That is in thirty; and I bored over there on the Government forty. That boring in there would be the southwest of the southwest. I don' think that was drift rock there. I found rock in every place I bored on the land."

But I don't think I bored on the land just described. I cannot swear as to the quantity of phosphate in any of these lands, because I didn't weigh it as I told you, I didn't make the estimate. I didn't have it analyzed, but it is like everything else around there, and they all look alike; it was just a deposit. The Captain there knows that. He has bored all over that thing. When you are trying to buy land, it is the rule to bore sixteen holes to the forty in that territory, but I was not doing that either exactly. This was government land and I couldn't get it, but I had previous to that time, before I made that application there, had just gone across it and put down these holes, but when the Government tells me they would put me in the penitentiary in case they found—It was written out from the Land Department—they sent me the affidavit I would have to make, and says if it is true there is rock on it, they would have me up for it. They sent me the affidavit—the affidavit reads this way. They sent me the affidavit that if I violated they would get me. I knew if I took that land I would violate it, so I dropped [fol. 46] the whole business and let it go. I wouldn't fool with it because I would be getting it knowing this rock was on it. It depends upon how you are situated whether you find phosphate in one forty and find none in the next. In some sections of the country you will find phosphate here and there. It depends on how much rock there is in your sand or matrix, but if you got that matrix there, you may miss it at this boring, but you bore right over there, and the chances are that there is lots of rock there. In a phosphate belt, probably not over eight or ten per cent of the average section of land contains phosphate, but that is not, that is a drift belt, just like it was one sea and just got filled in, like you find these bars in the river, all gone in there. They were not made there.

On re-direct examination the witness testified:

This Company has never mined any of these lands. They built a spur down there, and all of a sudden they quit, they didn't go in there at all. They built that spur in 1906, or 1907, I don't know which now. Right soon after they made this purchase. This Company hasn't any plant near these lands; their nearest plant is at Fort Meade, five or six or seven miles away. They didn't run this branch in 1906 from their plant; it started about three miles South of Fort Meade, and run across and crossed the river, and then they put up a saw mill and built this other plant. This other plant is some distance. For your people's edification and benefit I will

tell you how come me in there, how come me to know anything about how that deposit was formed. I was down in there hunting rock and I run North and South and ran East and West. I started over there on the corner of section thirty and bored running right down [fol. 47] that line, between thirty and nineteen, I tried to put them about every quarter of a mile apart. I ran on down through those sections and across over and near on the one of thirteen and twenty-four. Then I came back after that and started on the eastern side again and run a line north and south, and I found rock everywhere I bored. I found about the same quality of rock, but I didn't always find the same quantity. Some places there would be more sand than there would be rock, other places there would be more rock than there was sand, and then I jogged about from place to place over that entire territory within a radius of two miles or two and a half. That was when I was hunting rock, before I was off at all.

The District Attorney propounded the following questions to the witness:

"Q. Mr. Childers, by reference to the plat which has been prepared here showing the location of the lands described in the bill of complaint, please state whether or not you are certain that you examined the particular lands in question for phosphate? In other words, by reference to the plat showing the location there, are you certain that you bored on those particular forties described in the bill of complaint?

A. Yes, sir; I made a boring right here (indicating) somewhere along, I don't know whether it was on this forty or that one (indicating). "Really I don't know whether I was on that forty or that one, I was right on the edge of it. I could not show it on that plat, sir. I was boring approximately over the whole territory you know, and I wouldn't say that I bored this forty or that one (indicating), but there is a tremendous deposit of rock all around through here [fol. 48] and everywhere else (referring to lands outside of the lands involved in this suit). I don't believe, however, I ever did make a boring, unless perhaps it was on this forty (indicating). I don't think I ever made a boring unless perhaps on the northeast of the southwest of nineteen. And still it might have been right here (indicating). Those lines run light across. You remember I was just going over these lands. I don't think, however, I bored on any of these forties (indicating); I had a report but I was not present when that boring was made. It was my men boring for me. I was not present, and didn't go there and see the place afterwards. I don't know that I ever made a boring on any one of those particular sections.

The District Attorney propounded the following question to the witness:

"Q. Then you are not even certain that you made a boring on the northeast of the southwest of nineteen, you simply think that possibly you did, is that right?

A. Let me see, that house is located right over there (indicating). I believe now that that boring is right about that line (indicating). It was either on this forty or that. I don't know which. I believe now that the boring I made was either on the north west of the southeast, or the southwest of the southeast. And right close in there to those corners—unless I had a chain and laid it out I couldn't say which one it was, but I found rock there (indicating) but whether it is on this or this (indicating) I was satisfied when I was on it it was all there, except I was satisfied there was not any rock down in here. (Indicating on the southeast of the southeast of thirty.) I don't think I bored on the southeast of the southeast [fol. 49] of thirty. I hardly think there is a deposit of phosphate in that part of the section, because it has got a kind of limestone formation. I never did bore on this twenty-nine. Here is what I sold them (indicating). I run out of rock when I got up here on the southeast of southeast of thirty. I don't believe there is any rock on the Southeast of the southeast of thirty.

On re-cross examination the witness said:

There has never been any rock mined in the neighborhood of sections nineteen or thirty. The nearest plant is over there across the river about two miles and a half on the west side. I have been living there for a great many years.

And thereupon the defendant to maintain the issues upon its behalf, produced as a witness E. C. STEWART, who being duly sworn, testified as follows, to-wit:

My name is E. C. Stewart. I reside at Bartow, Polk County, Florida. I am the E. C. Stewart that procured the State Agent, B. F. Hampton, to make the scrip location on the land involved in this suit. I got someone to make the non-mineral affidavit. At the time I had no knowledge of the existence of any phosphate deposit in these lands or under these lands, or any part of it. I did not have any reason to believe or apprehend that the land contained any phosphate deposit. Mr. Singleton applied to me to assist him in getting the land. He said that they were Government lands and asked me if I knew how he could procure them. I applied to Mr. B. F. Hampton, State Agent, and he furnished me with some blank non-mineral affidavits and said if these affidavits could be made, he could select the [fol. 50] land. In looking for someone who had knowledge of that country I thought of Mr. Hollingsworth because he was raised in that section of country, and seemed to be the most available man to send down there to look at it. I asked him to go down and examine it. He did so, and came back and reported that he had been over it. He reported that so far as he knew, it did not contain any phosphate deposit; that he found no evidence of phosphate deposits. After he furnished me with this information I had the affidavit prepared and requested that he make the affidavit in accordance with his knowledge

of the land. I had not the slightest intention to defraud the Government. I had no interest in the matter whatever.

On cross-examination the witness said:

I have no personal knowledge whatever of the land, or of the nature of the land. Have never been on the land or right near it. I could not from my own knowledge say whether or not it is mineral or non-mineral land. I prepared the affidavit when he came back with his report and had him to make it. I have no personal knowledge whatever as to what he did, or the nature of the examination he made.

On redirect examination, the witness said:

I haven't the least interest in this suit.

[fol. 51] And thereupon the defendant to further maintain the issues on its behalf, produced as a witness J. J. SINGLETON, who being duly sworn, testified as follows, to-wit:

My name is J. J. Singleton. I reside at Fort Meade, Polk County, Florida. I was prospecting mining land for the Charleston, S. C., Mining and Manufacturing Company in the year 1906, '07 and '08. I am the J. J. Singleton who requested E. C. Stewart to obtain this land from the Government that is involved in this suit. I acted as agent for the company in procuring this land, and was prospecting some land near by these lands and on account of their location they were material to the proposition which we were considering at that time, and I advised with Mr. Stewart as to the possibilities of procuring these lands. I told him that we desired to obtain these lands. At the time we were trying to procure these lands or at the time they were purchased, I did not know that they contained any phosphate deposits. I made no examination of these identical lands, but did examine some of the adjoining lands. I saw these lands and went over them before they were purchased. From the surface indications I did not believe, or have any reason to believe that these lands containd any phosphate deposits. The Company had never had these lands examined for phosphate that I know of. The Company did not procure these lands for the phosphate. The object of purchasing these lands was that they were lying between the Atlantic Coast Line Railroad and the lands that they were considering purchasing, and they would have to cross these lands with their railroad. These were high lands and adjoining some of the lands that they were considering the purchase of, and as all of the lands which they were considering the purchase of were low and swampy, there was no place [fol. 52] upon which they could erect a plant and build houses, and these lands were very suitable for that purpose. They were also near enough to the lands purchased that if outside parties purchased them, they could give the Company a great deal of trouble in the way of

having blind tigers, and putting up objectionable houses, and from that standpoint these lands were considered available propositions for what we were considering. I know J. E. Hollingsworth; I did not know him until he came down to examine the land; that was the first time that I ever saw him. I was with him when he examined the land. He and I didn't discover any evidence at all of the existence of any deposit of phosphate. From my knowledge of the land now, I do not think there are any paying deposits. To the best of my knowledge there are no paying deposits; I mean deposits that could be mined at a profit. So far as I know, the lands involved in this suit have no value as a phosphate deposit. I do not consider them as valuable for phosphate. I never saw the affidavit of Mr. Hollingsworth, and I do not know what the statements contained in his affidavits were or are.

Witness here shown the affidavit, examined it, and testified: At the time Mr. Hollingsworth made this affidavit, at the time the lands were located, and at the time the Charleston, S. C. Mining and Manufacturing Company acquired the lands, I, in good faith, believed that the statements in that non-mineral affidavit were true. I now believe that the statements are true. I was the representative of the Charleston S. C. Mining and Manufacturing Company, and had charge of procuring these lands. It is not true that this defendant Company desired said land only because of their value for phosphate thereon. I don't think it is true that the officers of plaintiff's Land [fol. 53] Department were misled and deceived by fraudulent and untrue statements so made by and on behalf of the Charleston S. C. Mining and Manufacturing Company, and that because of said deception and fraud they were induced to allow, approve, and certify the selection made of the land. In fact, I wrote the Company that I did not consider these lands of any value to them except as terminals for their roads, to build their plant and operatives' houses, and keep off objectionable parties,—keep them away from the vicinity of the plant they were expecting to build. And it was upon this representation to the Company by me that they consented to procure these lands. I do not know how or what arrangement was made. I only got this matter started and went off to some other work. I did not know Mr. Hollingsworth, and do not think I ever saw him until I met him on these lands. There was no conspiracy or fraud on my part, representing the Company, to get anybody to make any improper representation. I did not know that Hollingsworth was coming until I got a telegram from Mr. Stewart asking me to meet Mr. Hollingsworth and carry him out to this property. I have had much experience in examining and developing phosphate lands. I don't think anybody could determine whether lands contain phosphate deposits by walking over the land. Sometimes there are surface indications, and sometimes there are not. The rules and instructions of the Company under which I had to work were, that a deposit to be worth mining, the matrix that contained the phosphate should contain from ten to fifteen per cent, not less than ten to sixteen per cent of pebble, and that this stratum should be as thick as the over-burden on the top of it, and that no deposits that had an

over-burden of over twenty feet was worth mining. My instructions were that when I had bored twenty feet to stop; that it was useless [fol. 54] to go any further. If there really was any rock there, it would not be worth mining. Under the modern method they go a little further, but twenty feet is still considered about the limit of paying deposit unless it is a very heavy deposit. We bored land in forties adjoining some of these lands; we bored up to within a few feet of these lands and found no deposit. I think Mr. Childers knows very little about phosphate deposits; I don't think he has had any experience by any definite or active method. It is still my opinion that there is no phosphate deposit under this land. There was one forty acres of the Government land that did contain some phosphate deposit. We cut that tract out; it is not embraced in this suit at all. It is the only Government tract around there that I found or that I had any reason to believe in all my investigations had any phosphate on it. I think it is still Government land. The Company did not acquire it, or make any effort to acquire it.

On cross examination the witness said: At the time these lands were purchased by the Charleston South Carolina Mining and Manufacturing Company, I was acting as the Company's agent; had just become their agent. I was specially employed to prospect lands and select them, such lands as they desired to purchase. I prospected and bored, and made examination of certain lands adjoining the lands in question in this suit. I bored up to within a few feet of these lands and found no evidence of phosphate. I do not remember the closest point; I did not measure it, but probably a hundred or a hundred and fifty feet from this land. In examining these lands I used an augur which we call a hollow augur, four inches in diameter; bored twenty feet and did not find any evidence of phos- [fol. 55] phate at twenty feet. If I did not find any evidence at twenty feet, occasionally I bored a little deeper. At that time we did not have any regular borings. I don't remember how many borings I made in this particular examination. I suppose in some places I put them down deeper than in others where the rock was found thin and had been thick; and boring out we put in less holes than we did where it was thick, we made a careful calculation. I suppose we made probably on an average of five or six holes to the forty acre tract. After we bored these holes we washed the sand and other material out that was not phosphate, weighed the crude sample first, and after it was washed weighed and washed sample; then we dried this to determine the amount of moisture in the rock, and weighed and dried the sample. Then we checked this by the depth of the deposit and the percentage of the pebble and the matrix. There was no surface indications upon the land which we examined by boring to indicate that there was a deposit of phosphate. The lands that we bored were low, in the pond and in the swamp, and the lands surrounding it were higher pine lands. There were not any surface indications on the land in question to indicate that there was or was not phosphate in it. If the adjoining land had not been prospected, it would have been necessary to make borings,—put the holes and the usual test in order to ascertain whether there was any

phosphate in there or not. The fact that I did not find indications of phosphate in minable quantities up to one hundred and fifty feet of the lands in question was a pretty good indication that there was not any phosphate in these lands, though not absolutely reliable. The reason why I considered this a good indication that there was no phosphate in these lands was, that our usual method was to com- [fol. 56] mence, even where there was a heavy deposit, by boring the first hole and then to extend out in every direction to the limit of the deposit in these lands, and the deposit gradually gets less and less until it gets so thin it does not pay to work it, and if these deposits get thinner and thinner as it goes out to the adjoining land, it is a pretty good indication that there is not paying deposit on that land because this deposit is running out, and that was the case in this instance. It was not possible in this instance for the strata of phosphate to have begun at some point other than the one I bored and come from another direction into these lands, and end before this other one running up this way that I examined had reached it, because I bored on the other side of it, other lands that were purchased on the other side. I bored around all these lands, bored on the east side. The main deposit that we bored was on the east side, and then we purchased other land on the west of this land that contained no deposit of phosphate. We also bored some north, but we did not bore any south. If the deposit was found on one single forty where there was no rock up to the edge of it, it would be a mighty small deposit and not considered worth much. There are sometimes small deposits found inside of a forty acre tract, but they are not valuable unless they lie contiguous because so much barren land would have to be worked; if you had to take up your plant and move it to the forty where there are small deposits, it would not pay to work it. The land that I advised the Company contained phosphate deposit was in a corner; this land we did prospect. Some of it was lying on the east and north of this tract. It was a continuation of the strata of phosphate which I had examined. I did not follow in that forty to see how far it extended. I bored a hole within about six feet of this forty and found a very fair deposit at [fol. 57] that hole. If this had been my land, had been owned by me, from the knowledge I had of the lands around it, I would have been willing to have sold it for non-mineral land without making further examination. I did not consider it worth more than other lands around it that were being sold for $3.00 an acre. I did say that I did not know Mr. Hollingsworth until Mr. Stewart asked me to meet him and take him out to the land. I drove him out in a buggy, took him to different corners of the land, and drove him over and around through the land. That was the examination he made. I did not show him where I had bored and the examination which I made of the land. His examination was simply a surface examination, so far as I know. It is not a fact that this non-mineral affidavit that Mr. Hollingsworth made was based upon information he got from me. It was not in addition to the surface examination. I did not see him bore or have any boring done. I could not tell you how he arrived at his conclusion. No officer or agent of the

Charleston S. C. Mining and Manufacturing Company came down and conferred with me about the land. We carried the matter on by correspondence. Mr. Chisholm came down on two or three occasions. The officers of the Company knew nothing about the land, or the possibility of phosphate deposits on the land. They relied upon my representations entirely. I advised the Company to get them because I thought they were suitable for building houses on, if necessary,—houses for the employes. All the lands that were under consideration were in the pond or swamp or bays. They had no place on which to put houses unless they made purchase of other lands adjoining; they had no place to build the plant or operatives' houses. The Company bought in that locality, as the result of my investigation, three hundred and sixty acres. That is the number of acres they had under consideration at that time. I don't remem-
[fol. 58] ber how much of the land contained phosphate; don't know that I can give any accurate estimate as to how much of it contained phosphate.

On re-direct examination, the witness said: I am not now in the employ of the Defendant Company.

And thereupon, the Defendant to further maintain the issues in its behalf, produced as a witness G. T. Hill, who being duly sworn, testified as follows, to-wit:

My name is G. T. Hill. I reside at Fort Meade, Polk County, Florida. Am a farmer. Up to a few months ago, I was with the Charleston S. C. Mining and Manufacturing Company, and they shut down and I have not been with them since. I had some experience in prospecting land for pebble phosphate. I have been with the Charleston S. C. Mining and Manufacturing Company a little over four years. I was with the Carolina Phosphate Company of the State a year or two. Have been with both of them, but have been with the Charleston S. C. Mining and Manufacturing Company a little over four years. I was on the outside handling labor, and all around and prospecting, and anything that comes to hand on phosphate land, where the labor had to be handled. Am familiar with the lands involved in this suit. Have been on them several times; have known them about eight or ten years. Am not just sure as to the length of time, but eight or ten years. I have not examined the land with a view of ascertaining whether or not they contain phosphate deposits,—have only been over it. There are no surface indications of phosphate there. I have spoken about that long before I knew this suit was on, and since this suit was started
[fol. 59] I have gone over the land and looked at it and still found no surface indications. I never prospected it and never put an augur in it. There has been a railroad put across this land, that is, a track has been graded; I don't know whether they have got any iron on there. I failed to see any evidence of phosphate deposits from the soil that was taken or dug up. I saw one tree that was

blown up by the roots, perhaps a year or two after it had been blown up, and I saw no phosphate there. I also saw Mr. W. H. Lewis dig a fence hole around a little lot there, and there were no signs of phosphate. From my knowledge as an expert in the phosphate business, I would not have thought there was any phosphate in this land. Still, you cannot sometimes tell, because you can walk over land that has a deposit under it sometimes, and you wouldn't have any idea there was. This is high pine land. Sometimes there is pebble phosphate on that kind of high places, but it is not common; it is generally around a low place, ponds and swamps. That has been my experience in the phosphate business.

On cross-examination, the witness said: I don't claim to be an expert in the phosphate business. When I refer to surface indications, I refer to the fact that you will see pebbles on top of the gopher holes, or where trees have been blown over. That is indications, but sometimes you don't find them on the very best phosphate land. It is true that people in Florida have gone over and driven across and seen lands for years and years that they thought were of little value, and experts have come along and examined them and found they were valuable for phosphate deposits. I don't know just exactly whether the railroad was built clear across the land or not; it was on the land at any rate, or some portions of it. They made excava-[fol. 60] tions in laying the track of the road-bed. I couldn't say what depth, not thinking that I would be called on to tell about it; it was not over three or four feet, and may have been a little more or a little less. It is not always the case that this would be a sufficient depth to indicate phosphate. Sometimes you will find fairly good rock four feet, but that is the exception. I don't know the depth of the post holes. The posts were setting in the holes. I don't think they were set over three or four feet deep. There was no indication of phosphate there. The tree that was blown up was just a pine tree uprooted. There was a piece broken off. There was a little what we call sand rock brought up with it, but I saw no sign of phosphate. The land in question is ordinary pine land, timber land, having pine timber on it. I suppose there were a few oaks here and there. In wet weather there was a little basin where a little water would stand, but ordinarily it was high pine land. The lands adjoining mostly were low, but this was high piney land, good land. Of course in a rainy, wet season, it was not altogether dry.

And thereupon, the Defendant to further maintain the issues on its behalf, produced as a witness W. A. Evans, who being duly sworn, testified as follows, to-wit:

My name is W. A. Evans. I reside at Fort Meade, Florida. Am in the hardware business at the present time. I have had experience in selecting and prospecting phosphate lands. Have been connected with the phosphate business for seventeen or eighteen years; was with the Standard Phosphate Company. By boring I can gen-

[fol. 61] erally determine whether or not lands contain phosphate deposits; that is what you call prospecting for our Company. There is no way of telling from surface indications whether or not there is phosphate in lands. There are no surface indications whatever of phosphate on this land. I have been across the land and am familiar with the land and the location and the general characteristics of the land in question. I have lived in Fort Meade thirty years; live about six miles from this land. From my general knowledge of the character of this land and my experience as a prospector, I don't think that land contains any phosphate deposits. Of course you cannot tell from surface indications, but I would not think so. There is nothing there to have led anybody to have supposed and believed that there was any phosphate under this land. I would not think that there were any conditions existing there in 1906, '07 and '08 to have led this Company to have suspected that there was any phosphate under that land. From my experience as a phosphate prospector in this section of the country where these lands are located, very few of the lands contained phosphate deposit that have been improved. The property they bought in that pond is all that I ever heard that contained phosphate deposit. They are obliged to have those other lands so they can spread out. I refer to the Bull Pen Pond, the land they bought from Mr. E. R. Childers. That is the only land I know anything about that has been found there that contains any phosphate. That piece embraces three or four hundred acres. It is true that pebble phosphate is found in low flat places, but not always. You may find it there, and not find it for a mile or two miles away. In my judgment as an expert phosphate man, there was absolutely nothing there to have led this Company to believe and apprehend that this was phosphate land.

[fol. 62] On cross-examination, witness said: There is no way at all, that I know of, of telling from surface indications that land has phosphate deposits. In fact, phosphate Companies never buy land unless it has been thoroughly prospected and put through a thorough test. Except they buy lands around them thinking if they are worth it, but as a general prosposition, they do not. I had personal knowledge of these lands at the time that Childers bought them. I was there. I had never made a thorough examination of these lands, or saw anyone do so. As far as my personal knowledge is concerned, I could not say that I know anything about whether there is phosphate in this land or not.

And thereupon the Defendant to further maintain the issues on its behalf, produced as a witness J. E. Hollingsworth, who being sworn, testified as follows, to-wit:

My name is J. E. Hollingsworth. I live at Ellington at the present time. Was living in Bartow in 1906. I am the J. E. Hollingsworth that made the affidavit of which this is a photographic copy (witness identifies the paper handed him); that is my signa-

ture at the bottom there. Before I made that affidavit I went over the land to determine whether or not it contained any mineral deposit, at the request of Mr. E. C. Stewart, I believe it was. I didn't find any indication of mineral deposits at all, not a particle in the world. At the time I signed that affidavit I meant that the statements therein were true, and I believe they are true now. I was raised within about ten miles of this land, and have been over all the land there many, many times. I had no reason to believe or [fol. 63] suspect at that time that it contained any mineral deposits, none in the least. No facts have developed or anything within my knowledge to cause me to believe that there was any mineral deposit there at that time.

On cross-examination the witness said: Mr. J. J. Singleton was with me when I made the examination. We went over the land, looked over the land as near as we could from one side to the other. I don't claim to be an expert in examining phosphate. I did not make any borings. All I went by was surface indications. I did not see any signs of phosphate in the land. I do not know that it is very unusual for land containing valuable phosphate to give any surface indications. Once in a while you will find phosphate on the land because I have seen it. I saw some land near Bartow. I don't know who owned it, it was called the Commercial Company, running to the branches is what I went by at that time. The pebble running with the stream. There were no branches running through this land. I don't know that I know of any surface indications other than the pebbles that I have seen in the branches, except what was bored out of the land. You have some surface indications of phosphate the same as I said on top of the ground; you can find gopher holes sometimes. I don't think I paid any attention to any gopher holes on this land. I have never been around to see any phosphate operations that have relied on the gopher hole tests. If I was buying land for phosphate I would not rely on it, if it was a gopher hole. Captain Singleton did not tell me why he wanted me to examine these lands. I was requested by Mr. Stewart to examine them. Mr. Stewart told me to go around and see if I could see any signs of minerals or phosphate. At the time I did this I did not know what the lands were wanted for, or who wanted [fol. 64] to buy them. I only done as I was requested in regard to the land. He just asked me to go over and look at those lands and see if I saw any mineral phosphate on the lands. At the time I made the examination I was not advised that the Mining Company was expecting to buy them. At the time that I made the affidavit I realized that the sale of these lands depended on the affidavit I made as to their mineral character. I knew nothing about it at the time I went to make the examination. I only did as I was asked to do. As far as any actual test that I made, if there is any phosphate in that land I don't know anything about it, but I don't believe that there is. I have made such an examination, up to what I saw, that would justify me in making oath that there is no mineral deposit in these lands. If I had been sent out to examine these lands

for a party expecting to buy them, and it depended on my examination as to whether or not they bought the land for phosphate land, I would have to bore. If I was going to make a thorough examination for phosphate I would have to bore the land, and I don't believe if you bored this land you would find phosphate there.

On re-direct examination the witness said: I am not in the employ of the Charleston, S. C., Mining and Manufacturing Company, and never have been. I was not in the employ of Mr. E. C. Stewart. At the time I made this affidavit I had no connection at all with the Charleston, S. C., Mining and Manufacturing Company, not a particle in the world. I did not know that they had anything to do with the land.

[fol. 65] And thereupon the Plaintiff to further maintain the issues upon its part produced as a witness MORTIMER H. SEARS, who being duly sworn, testified as follows:

My name is Mortimer H. Sears. I am Mineral Inspector for the United States General Land Office, and have been such inspector since the latter part of February, 1909. I have examined since I have been in the service of the Government, prior to this time, gold, silver, copper, lead, zinc, radium, several of the rare metals, diamonds and coal. I had never examined phosphate lands before the examination and study I made of the lands involved in this suit. I examined the Northwest Quarter of the Southeast Quarter of Section Nineteen, East Half of the Southwest Quarter of Section Nineteen, North Half of the Northwest Quarter of Section Thirty, North Half of the Southwest Quarter and the Southeast Quarter of the Southwest Quarter of Section Thirty, Township Thirty-two, South, Range Twenty-six. (The witness designates the lands examined.) I examind all the lands described in the bill of complaint, except the Southeast Quarter of the Southeast Quarter of Section Thirty. I first went on to these lands April 15, 1915, and made a casual examination of the relative location and surface conditions, and later, on April 27, I began prospecting by drilling holes each forty acres of the tract examined; this prospecting holes lasted from April 27, up to May 15, inclusive. Holes were put down with an earth augur, measuring about four inches in diameter and about eight inches long, connected with detachable portions of pipe, and also by the use of a sand pump so that when material was encountered too soft for the augur it was taken out with the sand pump. We used a casing of four and a half inch pipe. A sample was taken [fol. 66] out and weighed and then was taken to a point where we could get a fair supply of water, and washed over a three-sixty fourths screen, the residue represented the pebble and any other coarse material which would not go through the screen. This was then weighed and sampled by quotation. The samples were afterwards dried and reweighed to get the percentage of moisture, and was sent under seal to Doctor J. H. Pratt of Tampa, for analysis. In getting the samples I went to depths varying from about twenty

feet up to about forty seven or forty eight feet, the depths I have shown on the map. I have shown on the map here the depths of the overburden and the depth of the phosphate stratum of the different holes, and if I am allowed to submit this in evidence it might be shown better than I can explain conditions encountered. The red lines on the plat or drawing which I have made indicate the thickness of the phosphate stratum. The little yellow spots at the end of the line indicate where we struck bed rock. Some of the holes caved so badly we abandoned them without reaching bed rock.

That portion of the line extending above the red portion dotted represents the overburden. Overburden is the nonproductive material over the phosphate stratum, which has to be thrown away in the phosphate operations. Perhaps I had better explain; this map is shown as representing a block of ground. This map shows a block of ground in the nature of a prism, so that I could show geographically the depth of the holes and the location at the same time. The upper portion of the rectangular tracts represent forties, and the top of the hole indicates its position in that forty. This is a drawing of prismatic section, as it were, of the land that I examined, showing the depth of the holes, with the indications I have stated, of the overburden and the strata of phosphate. The markings down [fol. 67] at the bottom, showing the description of the land, and the other, are explanatory of the drawing.

Plaintiff's Offers in Evidence

And thereupon counsel for Plaintiff offered in evidence the paper which has been identified by the witness, and the same was filed in evidence and marked plaintiff's exhibit "A."

I made, or caused to be made, one hole in each forty which I examined or prospected. I transmitted the material to Doctor Pratt for the purpose of analysis, in determining the percentage of bone phosphate of lime and percentage of silica, and the percentage of iron and alumina. He made a chemical analysis of it. As a mineral expert in studying the geological formation of Florida with reference to phosphate, I have prepared a geological map so illustrating or showing, from a geological survey of Florida, the location of the hard rock and land pebble phosphate beds. Witness is handed map and states: It is the map that I have prepared. I prepared it largely from the reports of the Florida Geological Survey. The large area in yellow on this map shows in general the Appalachian chain; particularly the alum bluff formation is illustrative of that. That alum bluff is one of the subdivisions of the Appalachian group; it is only a geological term for that strata. That is considered to be the original source of both the hard rock and the land pebble. The area in red marked with an "H" indicates the area covered by the hard rock, hard rock phosphates. This in red marked "L" indicates the land pebble deposits, what is known as the Bone Valley. The little black dots over this por-

tion in red indicating the land pebble area shows the approximate location of the phosphate plants in 1908. I have Bartow and Fort [fol. 68] Meade located, and also a cross mark in black in that area,—that is Southeast from Fort Meade. That cross indicates the approximate location of the lands in question in this suit.

And thereupon counsel for the plaintiff offered the Map identified by the witness in evidence.

To the introduction of which in evidence counsel for the defendant objected first, because the witness has not properly qualified to show that he is sufficiently expert to justify the admission of this map and his testimony in relation thereto; secondly, because it is shown that this map was made since the taking of testimony in this case, and can have no bearing upon the rights and interests that were had by the defendant in this case at the time this land was entered or located; and third, because the map is inadmissible for any purpose whatsoever, and the testimony has no bearing upon the merits of this case as made by the issues in the pleadings.

Map filed in evidence and marked plaintiff's exhibit "B."

Counsel for the defendant here moved to strike the testimony of this witness in relation to his examination of the land involving any phosphate deposits, first, because the witness has shown by his own testimony that he had no experience in the examination of phosphate lands in Florida; second, because the examination as testified by him was not sufficiently carried out to enable the Court to determine as to the quantity or quality of phosphate that was contained, if any, in the lands involved in this suit; third, because this examination was made since the commencement of this suit and since the taking of testimony in this case, and can have no bearing [fol. 69] upon the rights of the defendant at the time of the location of the land by the State, or at the time that the defendant purchased the lands from the State.

And thereupon the plaintiff to further maintain the issues upon its part, produced as a witness J. H. Pratt, who being duly sworn, testified as follows:

My name is J. H. Pratt. Am a chemist and mining engineer. Have been an analytical chemist since 1876, during which time I have had experience in making analysis of phosphate samples. I have had experience in analyzing samples of phosphate since 1876; that is when I started in the phosphate business. I have been introduced to Mr. Sears. I received nine samples from him to be analyzed, for the purpose of determining whether or not they indicated that the land from which they were taken had phosphate. The date of the receipt is on those certificates. I do not remember the exact date. (Certificates shown witness.) Those are the original certificates that were issued from the laboratory. The samples of ground were powdered, all that I received were powdered, and then we weighed out a portion. We took a weighed portion, say two grams,

of the powdered samples of phosphate and dissolved it in nitro-hydrochloric acid, and the solution made up to a definite volume, say one liter, well shaken, and an aliquot, say fifty cubic centimeters, is taken, in which the phosphoric acid is precipitated with molyodic solution; the resulting precipitate of phosphomolyodate of ammonia is filtered off, washed with water until neutral, and the precipitate is then dissolved in a standard caustic potash solution, the strength of which is definitely determined from a standard [fol. 70] phosphate; the excess of alkali used is titrated back with standard nitric acid solution to determine exactly what measure of the caustic potash solution has been used. This caustic potash solution has been standardized very carefully on a standard phosphate, the composition of which is well known, and which has been determined by a number of chemists From the percentage of phosphoric acid there is a factor we multiply by to determine the bone phosphate of lime, which is the standard ingredient recognized in the commercial world. The iron and alumina is determined as follows: a weighed portion, say two grams, is dissolved in hydrochloric acid made to a definite volume, an aliquot taken; the lime is separated by sulphuric acid and alcohol and filtered off; in the filtrate the iron and alumina phosphate is precipitated by ammonia, boiled and filtered off, and the residue of iron and alumina phosphate is ignited and weighed. This is the whole process as we carry it out. Of course there are minor details that do not cut any figure. In making these analyses I followed the most improved method known to me or to my profession.

Thereupon counsel for plaintiff offered in evidence certificates of analysis of J. H. Pratt, dated May 22, 1915, numbered from 1322 to 1328 inclusive, and also one numbered 1330.

To the introduction of which in evidence defendant's counsel objected because the analyses were made since the commencement of this suit and since the taking of testimony in the case, and they cannot be used to determine the rights of the defendant, it not being shown that the defendant was cognizant thereof at the time of the location of this land and the purchase thereof from the State.

[fol. 71] The papers referred to were filed in evidence and marked plaintiff's exhibit "C".

Thereupon counsel for plaintiff propounded the following question to the witness:

"Q. In order that the Court may fully understand this, Doctor Pratt, I will ask you to explain this, Doctor Prat, for instance you have here that phosphoric acid is thirty per cent and the bone phosphate of lime 65.55 per cent, in other words, what on these certificates indicate the amount of phosphate?

A. The reason it is stated that way, Mr. Phillips, is that the determination of the phosphoric acid or hydrate. Now there is a factor which we multiply that phosphoric acid by in order to determine the equivalent of bone phosphate in lime, that is the equivalent bone phosphate of lime for that amount. The bone phosphate of lime establishes the commercial value of the phosphate rock because it is

sold on that basis. That phosphoric acid is given in percentage and the equivalent is given underneath. That being the commercial analysis, indicates the commercial value of the rock.

On cross-examination the witness said: The amount of the bone phosphate of lime establishes the commercial value of the phosphate. Sixty eight per cent bone phosphate is looked upon as about the commercial value that is accepted. I do not mean to say but what at times other rock might have been utilized below the sixty eight, but that is the basis usually looked upon as average land pebble.

On re-direct examination the witness said: I should call it a low [fol. 72] grade phosphate. The standard percentage generally accepted for commercial purposes is sixty eight per cent. I think every one of these sampels analyzed, as shown by my certificates, falls below sixty-eight. 66.29 is the highest of these. Sixty-eight has been the standard per centage for commercial purposes since about 1892. I cannot say positively what percentage was accepted for commercial purposes in 1906 and seven, but I think it is sixty-eight; I do not believe there was any change at that time; that is for land pebble. That is the kind of phosphate we are dealing with here. This standard percentage has been gradually raised since phosphate began in Florida, due to other discoveries in Florida, that was not known at that time. When the interest was first started they used to accept as low as sixty per cent and large quantities were sold. That was before the discovery of the higher grades.

Certificates attached to the Original.

Thereupon the wintess M. H. Sears was recalled by plaintiff and testified as follows: I am considered as a mineral expert by the Department of Interior. I am a graduate of the Massachusetts Institute of Technology of the class of '96. I have been following this work ever since.

Thereupon the plaintiff to further maintain the issues upon its part produced as a witness J. C. Thompson who, being duly sworn, testified as follows:

My name is J. C. Thompson. I live at Bartow. Am a chemist by profession. I worked with Mr. Pratt at different times, over a [fol. 73] period of two or three years, and I have been in business for myself about six years. During that period of time I have analyzed quite a number of samples, but I do not know how many, but up in a thousand samples of phosphate. I am a graduate of Clemson College, in South Carolina. I have never made any analysis of samples taken from lands in section nineteen, but I have in section thirty. All of the analyses were made in the first part of 1911; part of the work might have been done the latter part of 1910, I do not remember. I have a copy that I made, taken from my book, showing the results of my analyses at that time. I have not the book which

I kept of my original record but I have all the data on a memorandum book. The data I have of the analyses I made myself. I did not make all these analyses myself. I had assistants in my laboratory at the time. They were made under my supervision. I made the notes and data and written memoranda I have here myself, in my own writing. Sixteen holes to each forty were made in order to get the samples that were analyzed, and there were five forties. I have not got the average analyses separately. I have the individual analyses that were made there.

Counsel for defendant object to any testimony of this witness in regard to examination of this land, and the analyses made, because it was made as shown by the testimony of the witness, in 1910 and 1911, several years after the lands were located and selected by the State, and after the State had sold the lands to the defendant.

Thereupon counsel for the plaintiff propounded the following question to the witness:

Q. Now you can go ahead and answer the question in such a way [fol. 74] that will explain it. Go ahead and state what kind of examination you made. You have stated there were sixteen holes to the forty, and now go ahead and explain about the different steps followed?

A. In the north half of the north-west quarter there were ten analyses made; there were in the eastern portion of this, we separated the upper from the lower strata and made separate analyses so as to have an upper and lower analysis of the upper and lower strata; in these eight borings on the east side of that piece there were ten analyses made altogether there. Those ten analyses were of the samples taken from the sixteen holes. There was one analysis made of each four borings, except in the instance where we separated the upper from the lower strata, which gave us two extra analyses. I have not got the percentage of phosphate shown in the analyses of these samples averaged up. They show here as running from 62.8 bone phosphate of lime, up to 64.87; iron and alumina ran from 1.17 up to 2.82 per cent. Those were the extremes shown. The percentages of the bone phosphate of lime indicates it is lowgrade rock. As to its value for commercial purposes I cannot state, because that varies at different times and I do not know if they are selling as low grade as that. I do not know of ever having heard of any prices on this grade of rock. There were twelve analyses made in the north half of the southwest quarter, and another analysis which seems to have represented portions from this eighty and part of another forty. In that eighty there were sixteen holes to the forty, or thirty-two holes to the eighty. Now that entire number of holes were not included in the analyses, because there were two borings that did not show enough quantity of phosphate to consider. That is in the north half of the southwest quarter and at the eastern side of it, one of them right on the edge of it, and the other just in a little piece from [fol. 75] the eastern edge. The analysis as to the north half of the southwest quarter showed a percentage of from 61.60 bone phosphate of lime, up to 66.84; that 66.84 was a bottom sample, it was

a portion of the entire depth of the strata, and the other portion of which ran 64.70. The whole strata would not average 66.84, that was just a portion of it, the lower portion. The iron and alumina analyses ran from 1.27 up to 3.43 per cent. That is not excessive iron and alumina. At one time they used to make a limit of three per cent, but this average in here would not be three per cent. I performed this work for the Charleston, S. C. Mining & Manufacturing Company. In all mining for phosphate, the alumina that reduces the grade is eliminated. For instance, as the low grade appears in the ground it is mixed with a lot of clay and sand, and of course when we draw our samples we try to approxiate the amount of clean samples they had in the plant, so it will show what it is going to be. Of course, one man's plant might remove more sand than another. In that way one plant might turn out a better grade of rock than another. In this instance where I mentioned the lower strata was higher. If you throw away that top part of course your lower would be the higher portion of it, but if I am not mistaken the bulk of the deposit was in the upper portion. Generally, most of these samples, the bottom, although occasionally otherwise, was just a small amount that we make a separate determination on to find out if it would be better to throw away and not count it, although sometimes it is otherwise. Sometimes it is necessary to make examination of the shalloy top strata, or overburden, and throw it away and not count it.

On cross-examination the witness said: I have not get my average depth of the overburden on this land worked up on these four forties; [fol. 76] the average I made included another forty. I can get the variation by looking up the two extremes. I think nine feet was the lowest amount of overburden shown, thirty-one was the highest. These two though would not be the average shown. I overlooked one boring, the highest was thirty-two and a half instead of thirty-one. Ranged from nine to thirty-two and a half.

On re-direct examination witness said: In making the analyses of those samples, I followed the most approved method know. I followed the method that is laid down by the Association for Chemists for this work. I have forgotten what size mesh or screen I used in the washing, but I believe it was a thirty-seconds screen in width, and the length I do not remember now whether it was half an inch or three quarters of an inch, but somewhere along in there. I could not tell unless I tried it in another direction whether the use of a three sixty-fourths screen would cut down the percentage of silica; not in this particular piece of land, but in this section I tried some land that was, but it did not make any difference in the grade and I discontinued it. We made about two or three where we thought it was a good opportunity to try it, but it was not on this land. The cutting down of the percentage of silica increases the bone phosphate. I do not know for what purpose the Charleston, S. C. Mining and Manufacturing Company had these lands examined at that time, except to find out what was there in the way of phosphate.

[fol. 77] Thereupon the plaintiff to further maintain the issues upon its part produced as a witness R. C. Langford, who, being duly sworn, testified as follows:

I live at Fort Meade. I am acquainted with the lands involved in this suit described in the bill of complaint as the east half of the southeast quarter, and the northwest quarter of the southeast quarter of section nineteen, and the north half of the northwest quarter, and the north half of the southwest quarter of section thirty, township thirty-two range thirty-six. I was acquainted with these lands in 1906 and seven. It was generally understood that there was phosphate in both sections, and I bored four holes in nineteen myself.

Thereupon counsel for defendant propounded the following question to the witness:

Q. What time, Captain?

A. Well, I am a mightly poor hand to remember dates, but it seems to me it was about four or five years ago.

It must have been in 1906 that I bored them holes. It was along about that time they were making that trade. Mr. Chisholm made a trade with Mr. Childers for some land in thirty. I had a conversation with Mr. W. P. Chisholm about the land, which conversation was as follows: I told Mr. Chisholm that it was generally understood that there was phosphate in there. You see I have been over them lands now forty or fifty years, walked over them and rode over them and heard people talking about them, and Mr. Childers said something about Mr. Chisholm, the subject came up some way, that he was going to get it, or had got it—I had no means of knowing just when he did get it—but I told Mr. Chisholm that [fol. 78] Mr. Childers had done a lot of work in that territory and he says—no, I says, "you ought to pay him for this information," and he says, "If you don't do it you shan't have it," and Mr. Chisholm said to me, "It is none of his damned business." I am not sure whether or not they had actually bought the lands at the time this conversation took place. I had no means of knowing just when they did buy it; but it must be from that conversation I knew then that he had bought it or was trying to buy it, he must have been, or right along about that time. I don't think I told Mr. Chisholm anything about having prospected land myself for phosphate. I have been trying to remember whether it was before that I put them holes down in nineteen or since, but I can't remember. It was along about that time, but I don't remember whether it was just before or just after that conversation. I don't know whether I had any talk about that time with Captain Singleton about the land or not; possibly we talked about it. You know people working phosphate they talk a great deal. Captain Singleton was down there prospecting in thirty, and I was there to see him several times and we likely talked about it, but I don't remember any conversation I had with him about section nineteen. I did not think these lands of any value as agricultural lands. That was

the reason I wanted Mr. Chisholm to have it, they had been laying there so long, I thought if he would fix it with Mr. Childers satisfactorily and go ahead and mine it, it would be of some service to somebdy in the world, and that is what led up to that conversation. They are low and not much good; the timber is low. Part of these lands is called Bull Pond, in thirty. A little bit of it extends in nineteen. The Bull Pond land was sawgrass, used to hold water all the time, but my father ditched it out and drained the water off. [fol. 79] and several dry years come along and the cattle got to grazing on it and packed it and it hardly ever holds water now, but it was a big sawgrass pond until they ditched it out, but now it is a dry prairie like place. It is not such land as I would select for farming land. He did farm a little on a little bit, made some rice in it, best you ever saw for that; it had some maiden cane growing on it, and it is low and gets too wet, and is unsatisfactory farming land unless it was well drained.

Thereupon Captain J. J. Singleton being recalled by the Government, testified as follows on cross-examination:

I did not know anything about any non-mineral affidavit to be made. It was my understanding that the Company did not have anything to do with that. I only was connected with the case at first, and it was my understanding that they were buying this land at so much per acre. I understood that these lands were awarded for services to Mr. Hampton by the State, at the time the State secured them from the Government, and that the Government was buying these lands at five dollars per acre. I did not know that there was any mineral affidavit to be made in connection with the land until Mr. Hollingsworth came down there. But I did not believe there was any rock on it, because I had bored up to the limit of it, up to twenty feet, and did not find any. If I had been called on to make the affidavit, I don't think I would have hesitated, because I did not believe it was a mining proposition, or there was any rock on it of any value. I did not know the affidavit had to be made until Mr. Stewart sent Mr. Hollingsworth down there. I [fol. 80] had never talked to Mr. Stewart about it; I talked to him about it after that, I believe. Mr. Stewart was the man that spoke to me about the land, but I don't think he spoke to me about any mineral reservation whatever, or any affidavit that was to be made, up to the time that Mr. Hollinsworth came down there. From the knowledge I had of the land and from the surrounding lands, adjoining lands to this, I would have made that non-mineral affidavit if I had been called on; I would have been willing to have made it, for I did not believe there was any rock on it. I made this remark to Mr. Stewart afterwards, that if I had known it was necessary to make a mineral affidavit on it, I did not believe there was any rock on it, and I would have been willing to have made it. The only time I remember speaking to Mr. Stewart about that matter. The

reason I had for concluding that this particular land did not have a deposit of phosphate on it was, the strata was getting thinner as it approached this land and the overburden was getting deeper, the bottom of the strata was remaining about the same, but the overburden was getting deeper, and the strata was getting thinner, and when we reached near the limit of this property it was very thin; what rock we found within the limit that we had fixed to bore—if I had a piece of paper I would draw you a cross section as I found it in that pond, showing the overburden. (The witness handed a piece of paper.) This was an area covered by the pond (Indicating) and the property limit, the land that was bought from Mr. Childers ran a litle up there (Indicating). When we got out to this property limit it was over twenty feet down to the rock, and the rock was in that shape (Indicating). Here (Indicating) it was about ten or fifteen feet overburden; when we got here (Indicating) it was over twenty feet. That was the center of the pond. Well, it was toward [fol. 81] the west side a little. Well, not far from the center. When they first commenced prospecting they need a six foot steel rod and if a man did not find it with that he did not think there was any there. Finally it got up to ten and fifteen, and finally at this time twenty feet was considered the limit that it would pay. In prospecting the adjoining land to this land in question, I did not go over twenty feet in any of these borings. Occasionally I would put a boring down on the land we were prospecting, just to see the character of what we call the bed rock.

On re-direct examination the witness said:

I did not believe from my investigation that there was any phosphate rock of merchantable quantity on this land, and so informed Mr. Chisholm. This land, this string of forties about ten miles and a half long and this Government land laid between this deposit and the Atlantic Coast Line Railroad, where we had to go out with our spurs, and this land to the west of that was valuable on account of a right of way to get this railroad crossing, and this Government land being right on the border of this pond was valuable from the fact we might need it to put the overburden on, and to keep objectionable parties off of. I did not know that Mr. Hollingsworth was coming until Mr. Stewart wired me to meet Mr. Hollingsworth at Bowling Green and take him out and show him these lands. That was the first I knew. I did not know him before that. It is my understanding that when this non-mineral affidavit was furnished to the State's Agent, Mr. Hampton, that then the State located the land, and afterwards the State deeded it to these people. I knew nothing about the latter part of the deal; I was only in the first. I [fol. 82] was at some other work. I did not know how it was managed after that.

And thereupon counsel for the plaintiff recalled J. C. THOMPSON, who testified as follows:

Referring to the memorandum that I made in connection with the analyses of samples that I took from these lands that I testified about in this case, the tonnages ran all the way from two thousand four hundred and eighty tons per acre up to eighteen thousand five hundred and sixty tons per acre, an average of over nine thousand tons to the acre, to be exact nine thousand nine hundred and ninety-three. I have the data showing the thickness as we found it; these ran from eight feet up to thirty feet in thickness. The overburden ran from thirty-two and a half, the highest, and the lowest nine feet. I prospected a piece of land called the Childers tract, lying just east of this land here. This is not shown by the notes. I made one report on that, and then I started this land and made another report including this half section and another section on the west of it. I have some of the data—I have the original borings here of the Childers tract and the total tonnages as found on it. I haven't got the averages in this book though, as to any averages that were taken. I have the total tonnage, and then I have the borings made on the property. One hundred and forty-four borings were made, representing two and a half acres apiece, each boring representing two and a half acres. The total tonnage there was three million two hundred and ninety-nine thousand eight hundred and ninety-five. This Childers land lay to the east of the land that is in litigation now, and I think came right up to this land. I think what [fol. 83] is called the Childers tract came right up to these forties.

Thereupon counsel for defendant move to strike the testimony of the witness in relation to lands other than those described in the bill, because they have no relationship to the subject matter of this suit, and because the testimony is incompetent, irrelevant and immaterial to any issue in this case.

On cross-examination, the witness said:

Considering the character and the quality of the phosphate rock on the land involved in this suit, it would be very difficult to state how many tons would be necessary to constitute this a mining proposition for the reason that I have no way of determining what could be gotten for that rock after it was mined. I have no way of basing any estimate of the value of the stuff after it was mined. I know nothing as to the mine, simply as to the quality of the rock. I never heard of any rock of this particular grade being sold, so the cost of mining would have to be less than the selling price, and I have no way of determining what would be the selling price of this rock. I would not consider this rock as marketable phosphate rock. I would not make a report on land with so little data as the boring of one hole on every forty to determine the character, quality or quantity of rock in any given section of land. I would not report as to what was on the land. I made sixteen borings to the forty. I have reported on some land, reported on eight holes in a forty, but

when I was asked to do that, and I say I would rather make up on the sixteen. You do not get an idea, and some of the work I did on this section was done eight holes to the forty. That computation I made was figured out on the four forties.

[fol. 84] And thereupon the plaintiff, to further maintain the issues upon its part, produced as a witness A. E. PARKER, who testified as follows:

I live eight miles southeast of Fort Meade; have lived there eight years, or seven and a half. I am familiar with the character of the land involved in this suit. I live about between three and four miles of it, about four miles. My business is farming. This land has not generally any value as farming land; it is low flat, sand, soaky land, the whole business, all except a little bit of it—well, I don't know, the best I can get at that I don't think it reaches what I call the Big Sawgrass, but if it does there is nothing there that is fit to cultivate, and if it does reach it is in a pond flat, palmetto sand flats, that won't do to farm on at all.

On cross-examination the witness said:

People do not farm on that kind of land around me. I don't hardly know how they would drain it. I know the lines; they would have to drain a long ways, cut a ditch a long ways into Peace River. It is flat sand woods with little ponds all through it. I think about every bit of the land in that section is the same kind of land, unless that section takes in this, what we call the Childers house there, we know it by the Childers place, some knew it by the name of the Langford old place; if it takes that in there is a little bit of a knoll there of ten or fifteen acres that can be cultivated; outside of that there is nothing for cultivation on that land.

[fol. 85] Thereupon the plaintiff to further maintain the issues upon its part produced as a witness J. W. COLE, who testified as follows:

My name is J. W. Cole. I live three miles east of Janie J. phosphate mine, on the railroad. And in the naval stores business. I know something about farming and what kind of lands are good for farming; I have farmed a good deal in my life. I know the lands involved in this suit. From my knowledge of farming lands in Florida I don't think they would have any value for agricultural purposes. I would not undertake to farm on them. I don't think, on either one of those forties.

Thereupon the Government to further maintain the issues upon its part produced as a witness WILL BOWEN, JR., who testified as follows:

My name is Will Bowen, Jr. I live six miles southeast of Fort Meade; have lived there twenty-five years. Am engaged in farming. I am personally acquainted with the lands involved in this suit,—have been right there around it all my life, been on it off and on all my life. I would not think it has any value for agricultural purposes, because it is too low and flat, too wet; I don't think there is any soil there that would support agricultural business.

On cross-examination the witness said:

I know that very frequently lands of this kind, that have been drained are the best farming lands. I don't think this could be reduced to farming land if it was drained. The soil has got a hard [fol. 86] pan under there. The growth on it is just pine trees and grass; do very well for grazing. I guess; cattle does well out there all right. I guess it is what is known as salt and pepper land, though I don't know what you call salt and pepper land.

On re-direct examination the witness said:

When I speak of hard pan, I mean it is a brown looking soil tolerably close to the top of the ground, don't do much good for farming.

Thereupon the plaintiff to further maintain the issues upon its part, produced as a witness P. C. PARISH, who testified as follows:

My name is Parish. I live at Bowling Green. Am a farmer. I have no personal knowledge of these lands involved in this suit, the description of which you have gone over with me. I suppose I have seen the lands if you have got it rightly located. I have worked on them; was assistant foreman when they were boring the land at the time Mr. Thompson analyzed the samples; that was in 1911. From my knowledge of farming lands in Florida and from my experience in farming, the lands involved in this suit, in my opinion, are of very little value as agriculture or farming lands.

Thereupon the plaintiff to further maintain the issues upon its part produced as a witness THOMAS BEST, who testified as follows:

I live about three miles and a quarter northwest of Bowling Green. I can't say that I am familiar with the lands involved in this suit; [fol. 87] I have been over them and seen them a few times, or I suppose I have. I don't know enough about them to say whether or not they have any value as agriculture or farming lands. I was assistant foreman when the holes were bored in this land in the

latter part of 1910 and the first part of 1911. From what I saw of them then, I cannot say whether or not they were worth anything as farming lands. At different times of the season, you know it was pretty wet when I was there. I don't know enough about the character of farm lands to say.

Thereupon the witness J. J. Singleton was recalled by the plaintiff and testified as follows: I testified about prospecting the Childers tract; I did that prospecting in the spring of 1906, January and February, as well as I remember, and I may have gone a little into March. This was before these other lands were bought. I do not remember how many holes we put down to the forty. We did not put them down regularly. If we found rock we went to the bottom; if we did not find rock we stopped in twenty feet. I expect in that pond there we put down maybe twelve or fifteen or maybe twenty holes; I do not remember without referring to the map. I don't remember just how much was in the pond; there was—I have forgotten how many acres there were in the body. The showing as to phosphate on the Childers property was about two million tons. I forgot what they figured at the acre, they paid him forty thousand dollars for it. I think there was a part of it that contained—they contained about seven thousand tons to the acre on an average. I do not remember the average depth of the overburden; the overburden was comparatively shallow in that pond where the body was. I think the shallowest overburden in the pond [fol. 88] was eight or nine feet, and some of the rock went as thick as thirteen feet thick. Generally about ten or twelve feet. Some forties I put down more than eight, and some I don't expect I put down more than eight. Probably where we didn't find much rock we did not put down so many, but where we found rock we put them down thicker. I wanted to get enough holes to estimate the amount of rock. Where there was no rock I did not put down so many holes. I should think I put down something like eight holes. Some of that rock was soft and hard to determine and I was not satisfied, sometimes I would put two or three holes down in a place before I would be satisfied to make a conclusion on it. The company bought about eight thousand acres I believe from Register and Johnson for three dollars an acre right around there, about three dollars an acre. Mineral rights were reserved on part of those lands, and part they were not. I don't know that I can tell by descriptions shown to me whether those are the lands the company bought from Register and Johnson. This land was scattered over about six miles square and I do not know that I can tell you from memory. Some of the lands Register and Johnson only had a tax title, and the company did not figure these in, and some in fee simple, and some the mineral was reserved. However, at the time we took an option on those lands for about three dollars an acre we did not suppose there was any mineral reservation on any of them, they turned up afterwards, but they wanted that for the timber; if they mined the rock they would

need that timber, and the company considered it was worth what they were giving for it for the timber that was on it. They did not buy them as phosphate lands at all, they did not prospect it at all.

[fol. 89] PLAINTIFF'S OFFERS IN EVIDENCE

Plaintiff offers in evidence as exhibit "E" extract from the second annual report of the Florida State Geological Survey, prepared by E. H. Sellard, State Geologist, 1908-9 found on page 236 of said report, which reads as follows: "In 1906, the output of land pebble for the first time exceeded that of the hard rock. The amount of land pebble mined during 1908, was greatly in excess of that mined during any previous year, falling little, if any, short of a million one hundred and fifty thousand long tons," and an extract from page 237 of said report, which reads as follows: "During 1906, the demand for phosphate exceeded the ready supply, and prices advanced accordingly. Florida hard rock phosphate, which during the preceding year had sold for $7.50 to $7.75 a ton f. o. b. seaports advanced to $8.00 and $9.00 per ton. Much of the land pebble is sold under a guarantee of sixty eight per cent tricalcium phosphate; iron and alumina combined not to exceed 3.5 to four per cent; moisture not to exceed three per cent. Some of the producers of land pebble, however, are now able to guarantee as high as seventy two per cent of tricalcium phosphate; river pebble is sold ordinarily under a guarantee of sixty per cent tricalcium; iron and alumina not to exceed three per cent; moisture not to exceed three per cent."

Filed in evidence as Plaintiff's Exhibit "E."

Plaintiff offers in evidence an extract from the sixth annual report of the Florida State Geological Survey, prepared in 1904, by E. H. Sellard, Ph. D. State Geologist, found on page 91, which reads as follows: "The land of the pebble phosphate deposits of Southern Florida are much more uniform in their manner of occurrence than [fol. 90] are the hard rock deposits, the phosphate is in the form of pebble rock, imbedded in a matrix of clay, sand and soft phosphate, although variable from place to place, the phosphate bed has an average thickness of from eight to ten feet, its maximum thickness being from eighteen to twenty feet. The overburden, which consists largely of sand and sandy clays, with calcareous ledges, has an average thickness of from ten to fourteen feet. The best grade of land pebble rock, when properly washed and dried and selected, permits a guarantee of seventy five or seventy six per cent tricalcium phosphate. Other grades on the market range from sixty to seventy five per cent. The hard rock phosphate average from seventy-nine to eighty three per cent, although selected samples run as high as eighty four or eighty five per cent tricalcium phosphate. Practically all the hard rock phosphate mined in Florida is exported, that used in America amounting to not more than fifteen or eighteen thousand

tons per annum. Of the land pebble phosphate produced a little more than one-third is now being exported."

Filed in evidence as Plaintiff's Exhibit "F."

Thereupon, Solicitor for the Government rests.

Thereupon the Defendant, to further maintain the issues upon its part, produced as a witness J. H. MINOR, who testified as follows:

My name is J. H. Minor; residence, Fort Meade, Florida. I am in the phosphate mining business,—pebble phosphate. I have been in the pebble phosphate business since 1899; prior to that time I was [fol. 91] in the hard rock business. I think I am experienced in the active mining operations. From my knowledge of the mining operations of pebble phosphate, I think under the present conditions that there should be a minimum of three million tons to justify mining operations and to make it a paying proposition. Considering the grade and quality of phosphate that has been testified to by the Government's witnesses as being found on the lands involved in this suit, that phosphate could not be profitably mined at all under present conditions, not at the present market price. Practically the same conditions existed in 1906.

On cross-examination the witness said: I am connected with the Charleston Mining and Manufacturing Company as their superintendent, and have been connected with that company since August, 1907. I know nothing about any lands that the company owned prior to the time that I went with them. When I went with them I did not know what lands they owned. I did not say that in order to make it profitable land ought to produce three million tons to the acre. I said that I thought a deposit ought to approximate three million tons of phosphate to make it a paying mining proposition under present conditions; that is what I intended to say. I mean by that, you would have to have a deposit that would produce three million tons of rock to justify putting up a plant, an uptodate plant, a plant which is necessary at the present time and under present mining conditions to make it a paying proposition. It would cost a half million to a million and a quarter dollars to put up what I would consider an up to date phosphate plant; it would depend entirely upon the yearly output that would be desired. A half million dollar plant I should say on a good deposit, that the [fol. 92] yearly output ought to approximate a hundred and seventy five thousand tons a year. The lowest output of any plant I know operated in the phosphate section of Polk County is about fifty thousand tons a year. I have no idea as to what the tonnage amounts to, that is the quantity of the deposit in the lands, belonging to the Charleston, S. C. Mining and Manufacturing Company in Polk County in the vicinity of the lands in question, because they have a lot of land that has not been prospected. We are operating

a mine at Fort Meade; I know approximately what the tonnage is there. They own a great many lands around there contiguous to these lands in question. All of them are not considered as valuable for phosphate. None of them were considered valuable enough to mine at the present time. They were not considered valuable enough to mine before the war commenced and before the prices went down. To mine a phosphate deposit that my company owned on the east side of Peace River would require that we could compete with South Carolina Rock. It depends upon the freight rate they could get to the eastern points whether, if the competition with the South Carolina Rock was removed, the Company could afford to mine the phosphate east of Peace River. If the freight rate was not too high they could afford to do it. I suppose in fifty years from now that rock may be worth something, but it is not worth mining now. Nobody could afford to mine that grade of rock at the present time in Florida. The company could not afford to mine it now for the simple reason that the average grade of this rock is about sixty-three, and I figure that it would cost about from $2.25 to $2.50 a ton to mine that rock, mine it and dry it, and it is worth, figuring it on a unit basis, we figure the phosphate on a sixty eight per cent basis, that is sixty eight per cent bone phosphate of lime [fol. 93] B. P. L., as we call it, sixty eight to seventy per cent rock is worth to-day f. o. b. cars at the mine $1.65 a ton, and figuring it on that basis this rock would be worth about $1.20 a ton, and it would cost I think $2.25 a ton to mine it. Therefore I say it is a losing proposition, that it is an impossible proposition to mine it under present conditions. I was not in the phosphate business in 1906. At that time, during 1905 and six I was not interested in the phosphate business, I was in Virginia farming. I had been in the phosphate business prior to that time for several years and I had gone back to Virginia and was there two years on the farm, and I came back here in 1907, and I do not know exactly what the conditions were during 1906. Conditions affecting the price of phosphate are a little worse now than they were in 1907, but the market of phosphate was very low in 1907 and there was no demand for low grade rock even then. Before the low grade deposits in Florida would become valuable, the low grade deposits in South Carolina and Tennessee, which are more central points, would have to be practically exhausted and the medium grades in Florida would have to be exhausted. The sixty eight per cent rock would have to be exhausted before the sixty two to sixty five per cent rock would be a profitable mining proposition for the simple reason that the freight rate, both by rail and water, is the same on a ton of high grade rock and a ton of the low grade. Tennessee and South Carolina can furnish low grade rock with a shorter haul and are closer to the point of manufacture than Florida. I know the Childers tract that borders on this tract in question. As a mining proposition, it is practically the same grade of phosphate that is shown by Mr. Thompson's and Doctor Pratt's analyses. I don't know of any phosphate company that ever bought contiguous lands to a deposit that [fol. 94] they had found, unless they got them at a very small

price. I have sometimes acted as agent for different phosphate companies that have bought up outlying and adjacent lands to a deposit we had, when we could get them cheap, but we never figured on paying a big price for other lands unless we have thoroughly prospected and determined the value of them as phosphate deposits. It depends upon the market entirely whether the Company could afford to mine low grade phosphate if the company has a sufficient deposit of high grade phosphate, or have lands containing a sufficient quantity of high grade phosphate to warrant putting up a plant; possibly they could as far as the cost of putting up the plant, etc., is concerned. I do not know of any pebble deposits that have ever been mined on royalty. In the hard rock territory there are a great many properties mined on a royalty basis, but I have yet to know of a pebble deposit that has been mined on a royalty. I should think any company would prefer to own the land rather than have merely a mining right on it. If it is mined on a royalty it does not warrant the company in going to the expense of putting up a plant. In a case where a company owns a large tract of land that has a plant on it, operating it, and another person has a small tract near there, the person owning this small tract could have his land mined without putting up a plant; he could save the expense of a plant, but the cost of mining would be very much because he would have to pay the man who owned the plant a profit to get his rock mined, and also the wear and tear on the machinery. I do not know of any person in the vicinity of where this land is located who ever had his phosphate mined that way.

On re-direct examination the witness said: There is no phosphate [fol. 95] mined on the east side of Peace River where this land is located. There was one, but that has been defunct for eighteen years. That was the old Bell Phosphate Company which mined a few months but never shipped a pound of rock. From my experience in phosphate mining, I have never known a time that there was any market for the grade of phosphate that is testified to as being in this land involved in this suit.

On re-cross examination the witness said: H. A. M. Smith was a lawyer in Charleston for the Charleston Mining Company, when they purchased these lands; they were purchased in his name, for what reason I do not know.

Thereupon Captain J. J. Singleton was recalled for the defendant, and testified as follows:

I have been in the phosphate mining business since 1890, with the exception of two years. From my knowledge of phosphate mining in the pebble district, it would take in the neighborhood of three million tons with ordinary good conditions for mining, fairly good overburden and matrix that could be disintegrated rapidly, to establish an up to date plant of sufficient capacity to mine rock in competition with the plans already built. My experience in mining pebble phosphate has all been in Florida. In Florida to my knowl-

edge there has never been a time when there was any demand or market for the grade of pebble phosphate testified to here as being contained in the land involved in this suit. There was some land in Charleston of this same grade sold, but that rock is very peculiar; you can dry that rock for half of what you can dry this. They merely take a layer of wood and put it down at the bottom to start [fol. 96] the fire, and there is something in that rock that causes it to get hot twenty feet high, that rock is piled up on that wood twenty feet thick; it dries itself once you get the fire started, and that condition does not prevail with this rock. And then the Charleston rock is right on the Seaboard, and a good many of those mines have their dry kilns right at the wharf; they dry it and convey it right into the hold of the vessel, but in Florida the transportation and the competition with the higher grade rock, the effort is to find higher grade all the time, and the lower grade is getting into more disrepute all the time.

On cross-examination the witness said: You do not necessarily have to go deeper for the higher grade rock than you do for the low grade. I have seen some rock that would give seventy to eighty per cent right on the surface. I do not know of any high grade rock that is being mined for which they go down as deep as forty feet. I think they accept some land now at thirty feet on account of the improved machinery they have got for mining. The process of mining has been cheapened some by the increase in the capacity of the plant and improved machinery. Machinery that was efficient five years ago is not now, it is put in the scrap pile. You cannot get the rock deposit at a depth of thirty feet with improved machinery, at practically the same cost you could in twenty feet in 1906,—not that much difference in the same amount of rock, but if there is a large amount of high grade rock I suppose it could be mined at thirty feet. I have never seen any rock mined over twenty four feet. Our company has never tried to mine any that is over twenty feet, and it would have to be a very thick heavy deposit and high grade rock to pay to mine it over twenty feet, and the conditions of mining will have to be favorable. You see you take this [fol. 97] rock that has twenty-seven feet of overburden, for instance, that is nine yards deep, and you add sixteen feet on to that, making forty-two or forty-three feet, that you will have to mine, that will be fourteen yards deep. You take a square yard of that on the surface by the time you have mined that out you have fourteen cubic yards of material that you have to handle, and the way I have been figuring on the cost of this is that it costs twenty cents per cubic yard for handling that material, lump, by the time you move it. If you got fourteen cubic yards twenty cents a yard, will cost you two dollars and eighty cents to move that fourteen yards of material. It is generally figured, just figured in a general way, as to whether a proposition will pay or not, when you make a preliminary survey, that sixteen per cent pebble to the matrix would be a fair average of what you would be able to obtain. Seventy five per cent rock, several weeks ago, was selling f. o. b. for $1.65,

and if you had seventy-five per cent rock under that it would cost you $2.80 to mine it. I don't know of any of that grade of rock that has been sold in the past year for over two dollars. I do not think it has ever been over $2.50 a ton in the last five years; sixty eight per cent rock, except one time, it did run up pretty high just for a short time. When I answered the question that there would have to be three million tons deposit to warrant putting up a plant, I meant that if you have got a deposit you figure on by the time you have mined out that deposit you will have worn out your machinery, or if you have not worn it out it will be practically useless, it will be scrap; you must have enough rock that the profit on your rock, by the time you have mined it, will pay you an interest on the money you have invested. An up to date plant is from four to six hundred tons a day; it would be safe to say a hundred and fifty [fol. 98] thousand tons a year is a good average for a medium sized plant. Four hundred tons a day will figure about a hundred and fifty thousand tons a year; sometimes it will mine a little more. It is supposed they will have to renew a plant every five years. The repairs on a plant every five years will amount to the original cost. Of course the price of phosphate varies, but you take an average price and I don't believe the price in five years, it has averaged $2.50. There was eighty per cent pebble sold in Florida in 1913. One firm made three shipments that went over eighty per cent. The actual value of the phosphate shipped from Florida approximated $9,563,084. That is all phosphate; pebble and hard rock. For the last three years they have been finding a great deal of high grade rock, and they are prospecting and looking for high grade rock all the time, and what was considered a pretty good grade eight or ten years ago is out of the market now. The reason high grade rock is so much more valuable than the low grade is because it is shipped to foreign countries, and the high grade has less foreign matter in it that you will have to pay freight on; and the freight from Florida to Europe is the same on the law grade and the high grade, consequently that has to be taken into consideration, and that is why the high grade brings a better price. When I say high grade and low grade, I have reference to the units of phosphoric acid; the bone phosphate, that is equivalent to the phosphoric acid. I do not recall what percentage of the world's output of phosphate Florida produces.

On re-direct examination the witness said:

I am not now connected with the defendant in this suit at all.

[fol. 99] Thereupon Dr. J. H. PRATT was recalled for the defendant, and testified as follows:

A grade of sixty-eight per cent pebble phosphate, from the best information I have on the subject would require at least two million of tons to establish a plant on that particular tract. It is on the

basis of two million tons to establish a plant on any particular tract, that is supposing that there is no other rock anywhere around it, it would require that amount to pay back by a sinking fund to pay a profit on the mining operations, before the profit was exhausted. If that grade was under sixty-eight per cent and is from sixty-one to sixty-six I do not think there has ever been any market for that grade of rock, pebble phosphate, in this State, since 1906. Before that time there was a market for low grade of rock, but since that time I think all the information I have will go to show that there is no established market for that grade of rock.

On cross-examination the witness said:

If a company has a plant mining phosphate that has a percentage of sixty-eight, they might handle a limited quantity of a grade of rock below sixty-eight, provided it was not too low in grade. That would depend upon the wording of their contract, and what they had to supply. If there is a minimum grade named in the contract that would prevent the mixing of a material amount of this low grade rock, that is to say would carry the average grade below what their contract calls for, I do not see how it is practicable to mine the law grade of rock, because they cannot mine just a little bit of it; they would have to mine a material quantity, say one-half [fol. 100] or one-third of the entire output in order to make it pay. Unless restricted by the terms of the contract, it would be possible to work in a low grade phosphate with the high grade, so as to bring the percentage up, but it would be hard to rely upon a sixty-eight per cent rock as your maximum to bring it within any reasonable point. Of high grade rock, it ought to be above seventy per cent, seventy or seventy-three or higher, in order to make it profitable as a mining proposition, then limited quantities of the low grade rock can be used at times in order to make a grade that would establish an average of say sixty-eight. If they cannot average at least sixty-eight, it is a very doubtful proposition. In my opinion, I think if the high grade rock was high enough to enable them to work in a low grade to make an average of sixty-eight per cent, they could work it at a profit.

Thereupon counsel for the Plaintiff propounded the following question to the witness, to-wit:

"Q. Doctor Pratt, is it ever possible for mining companies to mine phosphate on a royalty basis in such manner as to reduce the expenses and make possible without going to the expense of putting up a building, don't mining companies mine rock for other parties on a royalty basis so the man owning the particular piece of land need not go to the expense of building a plant himself? The idea is this, Mr. Sears suggests the question here, I think the question answers itself, suppose there was a plant already in operation, and a man owns a piece of land near there with phosphate in it, he could lease it to the Company with the plant and have it mined in that way on a royalty basis?"

[fol. 101] Objected to by counsel for Defendant because no such condition exists in this case.

And thereupon counsel for Plaintiff propounded the following question to the witness, to-wit:

"Q. If those conditions did exist, he could mine it that way, could he not?

A. There was only one instance in which I ever heard of in which there was a proposition of that kind done, and that was on a very limited scale. I know in the hard rock region they have mined rock on a royalty, but I do not know of that happening in the land pebble region. I do not know how much royalty they paid, but I think it was twenty-five cents to mine, and that rock was very high grade. That was the reason of the whole transaction as I understood it. It was on a limited area that they agreed to mine it on a royalty, being a high grade rock. There has been a decided increase in the thickness of overburden. This is equivalent to the reduction of the per cent of phosphate,—in other words, the increasing of the overburden increased the cost of mining because the removal of additional cubic yards to the acre adds just that much more to the cost of mining the pebble. I know nothing about the average life of a phosphate plant, except from hearsay. I have not had any experience with the handling of phosphate plants in this district and it is only from hearsay. I have no interest in any of them. That is, I have no investment in any of them.

[fol. 102] Thereupon the Defendant, to maintain the issues upon its part, produced as a witness B. F. HAMPTON, who testified as follows:

My name is B. F. Hampton. I reside at Gainesville, Florida; I have an office in Jacksonville, Florida. I have no interest in this suit. I am fifty-one years of age. I am the B. F. Hampton that located the school scrip, or lands involved in this suit, which are described as the east half of the southwest quarter, and the northwest quarter of the southeast quarter of section nineteen, north half of northwest quarter, and the north half of the southwest quarter, and the southeast quarter of the southeast quarter of section thirty, all in township thirty-two, south range twenty-six east, February, 1906. I am the authorized selecting agent for school lands for the State of Florida, and have been since 1893. When I wished to secure a piece of Government land with this scrip, I filed a list of selections in the local land office at Gainesville, Florida. This list is usually accompanied by an affidavit from some person familiar with the land to the effect that it is non-mineral in character, and is not occupied by settlers. I rarely make this affidavit myself because it would be too expensive for me to examine the land in question. This list is approved by the Register and Receiver and is forwarded to the Commissioner of the General Land Office, and if approved by him, a list of the selection is made which is forwarded

to the Secretary of the Interior for his action. There being no objections found by the Secretary, and the land being of the character contemplated by the granting act, the letter is approved by him. No patent is ever issued to the State for indemnity school land. In this particular instance after I had paid the State for the land, I re-
[fol. 103] quested that a deed be made to the Charleston, S. C., Mining and Manufacturing Company. The deed were so made by the State and forwarded by me to, I think Mr. E. C. Stewart of Bartow, Florida. The negotiations were carried on by E. C. Stewart of Bartow, Florida, and when I received from him the purchase money he requested that the bond for title be made out to W. B. Chisholm, and I made out the bond for title to W. B. Chisholm. I had never seen Mr. Chisholm and had never heard of him before this transaction. I appointed Mr. J. E. Hollingsworth as my agent to make the affidavit as to the non-mineral character of the land, at the instance of Mr. Stewart, because I knew nobody in that neighborhood. I examined the records of the United States District Land Office in Gainesville, Florida, toward locating these lands and determining whether they were vacant, unappropriated public lands for homestead entry, and found they were lands that were subject to location according to the records. They were offered, having been offered on April 21st, 1879. They had been on the market ever since that time. I knew then that if the lands were non-mineral and were not occupied adversely, that they were of a character contemplated by the grant to the state, and that the locations would subsequently be approved by the Secretary of the Interior. I have had twenty-five years' experience in the public lands of the Federal Government in Florida. I have been State Selecting Agent since 1893, about twenty-two years. Up to sometime in 1889, all the public lands of Florida are classed as agricultural lands. After 1890 when the mineral laws were extended over Florida, there were two classes of land, mineral land and agricultural land. Of course the title to lands that are mineral
[fol. 104] cannot pass to the State under the school grant, but all lands that are not mineral, and are not in a state of reservation, are subject to location by the state, and such lands must be and have always been classed as agricultural lands. In fact, they were so returned as agricultural lands by the Surveyor General prior to their offering in 1879. These lands have never been reserved that I am aware of. The records do not disclose that it was ever reserved at all. At that time I do not believe that there had been any withdrawals in the state of Florida. I did not know anything about the mineral character of the land involved in this suit; I had no idea they were mineral. In fact, it never occurred to me that they were mineral, and I did not know that there was any phosphate company connected with the location until I was ready to deliver title. I never had any communication with the phosphate company or their agent, and I did not know that Mr. Chisholm was connected with the company. I do not know anything about the mineral character now. I have never seen the lands and I do not know

their character. I notice in the affidavit that I sent to Mr. J. E. Hollingsworth to sign, it is stated that the affidavit is simply for the purpose of acquiring the land under the agricultural laws. I wish to state that that is not the general form of affidavit required by the Government. In the grant itself, it was not stated that the State could select agricultural land or should swear that the lands were agricultural. Consequently a statement made by Mr. Hollingsworth in his affidavit was unnecessary, as he was not an applicant for the land, nor was it necessary for the state to claim that the lands were agricultural in character. This affidavit was simply a printed form which they had in the land office, and I sent it to [fol. 105] Mr. Hollingsworth in the absence of anything better.

On cross-examination the witness said:

Mr. E. C. Stewart at Bartow, who at that time I think was the Clerk of the Circuit Court, negotiated with me the purchase of these lands. He never mentioned the Charleston South Carolina Mining and Manufacturing Company or any other person, if I remember correctly, but said that he wanted to locate the land and the prices. I named the prices and he immediately sent me the money, asking me to make out the bond for title in the name of W. B. Chisholm, and my records show that the bond for title was made out in the name of W. B. Chisholm. It was only when we delivered title that the name of the Charleston South Carolina Mining and Manufacturing Company came up. I haven't the letter that he wrote me about it; all of my old records back at that time were destroyed in the fire which I had in Gainesville. Everything was burned up. I don't recall that he ever mentioned any reason why he ever wanted the land. In fact, that would be one case in five hundred why he wanted the land. I will state this, however, that in nearly ever instance where I have represented the State of Florida, where I have sold any of his scrip, I have been particular to tell the purchaser that it would not carry mineral land. I am not sure that I told him that, but that was my custom. I do not recall whether he told me in his letter what land by describing the land. I presume he did, because he wanted to know if all the lands were vacant. My first move after getting a letter of that kind would be to send it to the land office to [fol. 106] see if the lands were vacant and the sale could be made. I had Mr. Hollingsworth to make the affidavit simply because Mr. Stewart gave me that name; I have never seen Mr. Hollingsworth; I did not know his name, and have not seen him to this day. I sent the non-mineral affidavit down to Mr. Stewart for Mr. Hollingsworth to make. That is a copy of the non-mineral affidavit that is required of individuals in making entries under the agricultural land, but not a copy of the affidavit required by the state in making these locations. The state affidavit is practically the same as that, except that it does not state that the lands are agricultural in character. That affidavit states that he has made application for the purpose of acquiring these lands under the agricultural laws, he is not an applicant for the land at all. I think that the affidavit required by

the state contains a statement to the effect that the land is not occupied by any inhabitants. I never at any time had any correspondence with Mr. Chisholm or any agent of the Charleston South Carolina Mining and Manufacturing Company. I had no knowledge whatever of the land,—just as I have sold thousands of other acreage.

On re-direct examination the witness said:

It is customary for me to get other parties to make these non-mineral affidavits where the lands are distant from me, I never make the non-mineral affidavits. This land is probably seventy-five miles from where I was. It was selected and located in the usual way.

STIPULATION RE DEFENDANT'S EXHIBIT No. 4

It is agreed by and between counsel for the Plaintiff and Defend-[fol. 107] ant, respectively, that the Defendant's Exhibit "No. 4" may be omitted from this recital of the testimony, and that the Court may make an order for said original exhibit to be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, and be used and referred to in the argument of this cause and be considered by the said Appellate Court, as though the same had been embodied and recited in detail in this recital of testimony.

Thereupon the defendant to further maintain the issues upon its part, produced as a witness W. H. LEWIS, who testified as follows:

My name is W. H. Lewis. My business is a variety. I do a little of everything, farming, and I have some cows. I have had nearly a life time of experience in farming in the State of Florida, in my boyhood days in Hillsborough County, and since I have been a man over in Polk County. I live in Polk County now, in the southern part. I live about six miles north of the lands involved in this suit, being the east half of the southwest quarter and the northwest quarter of the southeast quarter of section nineteen; the north half of the northwest quarter, the north half of the southeast quarter and the southeast quarter of the southeast quarter of section thirty, all in township thirty-two south, range thirty-six east. Have lived there just about twenty-seven years. Have been partially engaged in farming during all that time. I am familiar with the lands involved in this suit; have known them twenty-five years. I would call the majority of this land fit for cultivation without artificial drainage; there is some ponds and things around there that would need artificial drainage. Most of this [fol. 108] land is just common timber and palmetto wood, pine timber. If drained it would all be suitable for cultivation. I would state that was agricultural land, with drainage. People around this

land generally raise corn and sweet potatoes, peas and cane, that is the general majority of the crops raised there. Most any kind of crops grown in Florida could be produced on these lands. Some of this land lying around these ponds is suitable for pasturage. Of course if it was drained it might be better. I have cultivated land close to this land. There was no difference that I could tell in the quality of this land and that.

On cross-examination the witness said:

I expect it has been a couple of months ago that I saw these lands last. I went out there to look at them for that particular purpose; I went out there to look it over. I went with Captain Minor. I guess it has been a little over two months ago. I am pretty sure it was the same land a description of which was read to me. I used to own three hundred acres of land adjoining this land along side of it. To the best of my judgment, I looked at those very lands that you read me description of, that is the land in that vicinity. I didn't run the line or go to each corner. We drove over the land, through the land. I know where Bull Pond is. I used to own it. I believe it lay right east of this land. Bull Pond does not cover any of this land; if it does, it is a very small part of it. It may cover one hundred feet of it, but I don't think it does. A good deal of that land down there has not been settled, but there has been settlers living there thirty years, adjoining these lands, the same class of land [fol. 109] they are very good settlers. J. W. Singletary was one who cultivated land like this. He is the brother of the fat man that lives out at Homeland. He is dead. John Manley lives right down south of it; he has cultivated a good deal, he has a good farm, a good class of land in fact, right down next to it. In some localities in Florida it is true that one spot can be exercised or used for cultivation, and right along adjoining it for quite a distance for several acres it is not recognized as very desirable for farming. Of course anybody acquainted with Florida land knows there is a difference in the varying fields. I don't know that it is a fact that there is so much more land desirable around this land in question, that a person would not resort to that for farming as long as he could get any other. I believe there is some of that land as good as the land that is taken up there. If you will drain it, you might say three-fourths of it is as good as the land taken up. Without draining, I would say about half of *of* it, or maybe more. I have no connection in a business way with the Charleston South Carolina Mining and Manufacturing Company. I have never sold them any phosphate lands. I had no connection with Mr. Minor in business, only that we owned some bank stock together.

On re-direct examination the witness said:

We were separate stockholders. I haven't a bit of interest in this suit. The majority of lands in Florida are agricultural lands if they can be drained. All lands that are not mineral lands are

agricultural lands in Florida, and a whole lot of lands that are mineral lands.

On re-cross examination the witness said:

[fol. 110] If it is drained, you can farm on that land out in the territory for about thirty or forty miles square east of Arcadia, Florida. They are draining it. I don't know about the cost; not more than any other. They turn it over with big plows and cultivate it. They may not make as much as they do on rich hammock land, but they have been cultivating it.

Thereupon the defendant to further maintain the issues upon its part, produced as a witness C. L. MARSHALL, who testified as follows:

My name is C. L. Marshall. I reside at Fort Meade, in the southern part of Polk County; have lived there six years. I live about six miles from the lands in Polk County described as follows: The east half of the southwest quarter, and the northwest quarter of the southeast quarter of section nineteen, and the north half of the northwest quarter, nor- half of the southeast quarter, and the southeast quarter of the southeast quarter of section thirty, in township thirty-two, south range thirty-six east; have lived within six miles of these lands six years. I am fairly familiar with these lands; I have been over them. I have been over that, through that section of the woods several times; as to the exact location of this particular tract though, I haven't known it but about two or three months. I am in the naval stores business and farming. I might say I have had a life time experience in farming; I was raised on a farm. I have had experience in farming land of similar character to the lands which are involved in this suit. I would consider the land involved in this suit and which has been described to me, as agricultural lands. It [fol. 111] is suitable for farming purposes and pasturage. I would say that two-thirds of it is suitable for farming purposes without draining it. I think it would be capable of drainage. I have had to drain lands of similar character to these lands when farming them, in order to farm them. Some of these lands have been used for grazing lands. I have not farmed any lands close to these lands; not near them; have farmed lands six miles from these. I have no interest in this suit and no business connection with the Charleston Mining and Manufacturing Company.

On cross-examination the witness said:

I have been as I say I have been all through that country. I guess I saw these lands about a month ago. I went out there particularly to see what character of land it was. Mr. Minor went with me. The growth on the land is mostly pine timber; three fourths of it is pine timber; it is fairly good pine timber. It has not been boxed. It has been boxed all around it in the adjoining country; I don't know but what the least bit of this is boxed. It is true that the lands

of the character of these lands in Florida have been heretofore mostly used for grazing lands. The natives who know Florida land usually select a different class of land for cultivation purposes, but it is simply to keep from having to dig a ditch to do a little work. Lots of times lower land is a better farming proposition. Much of this kind of land has been left to be bought up in large tracts, and sold by land companies to people up north.

[fol. 112] Thereupon the defendant to further maintain the issues on its part, produced as a witness LEON PRINCE, who testified as follows:

My name is Leon Prince. I reside at Fort Meade. I have been out on the lands involved in this suit several times; I was out there looking them over not long ago, to determine whether they were suitable for farming purposes or not. I have had experience in farming all my life practically; I was raised on a farm. I am thirty-six years of age this coming August. I live about six miles from the lands in controversy. From my knowledge of farming and my experience farming in Florida, I would consider these lands good farming land. The character of the land is pine timber, and it has got low land of myrtle on it which always indicates pretty good farming land in this country. If these lands were drained they would be more valuable. They would make good grazing land. I think they have been used for grazing purposes. I suppose about half or two-thirds of this land would be suitable for farming purposes without draining. I am not connected in any way with the Charleston S. C. Mining and Manufacturing Company. I have no connection with this suit or with Mr. Minor; no more than just friendship is all.

On cross examination the witness said:

In my farm I have got in cultivation about seventy-five acres. I don't know that I could tell you how many acres out of that seventy-five is like this land; part of it is low land like this, but I couldn't say just exactly how much. Of course it is a different character of land around the locality I am in. It is true that the crackers get hold [fol. 113] of what they consider the best land, and then they leave the other people to pick for what they can get. That is not the case with this land; there is some good land on this, as I just stated. I would say there was about half or two-thirds of it that I would not be scared to risk myself out on for a farm. I don't think it would be necessary to drain that part before I would be willing to risk myself on it. Drainage would be best on some of it. There are no ponds on this that I am speaking of. It was out in the pine timber; I notice there was a lot of this lowland myrtle out in patches on it which open you know, indicates pretty good farming land. I went over it as a whole, kind of passed through looking at it; I don't know how much there was. I might say I saw all of it. I did not take it step by step over it, but around over it. If I didn't go over every

forty I got up pretty close. I noticed some mighty good farms mighty close by. They looked to be pretty good corn growing. It is true that you can have a mighty good farm, everything growing fine up here, and then off for several acres out here there is a spot of land that people won't fool away their time and money trying to farm on it; and you can go half a mile or more and strike another good farm; but this has the indications that it was all about the same. I judge it would grow potatoes, cow peas, corn and stuff like that you know, which is the backbone of our country now. I think it would make about fifteen or twenty or probably twenty-five bushels of corn to the acre, if a fellow gets around it right close. I don't know that you would have to put so much fertilizer, I don't know that you would have to put any to get that yield. I have cultivated some land just about like it in the earlier days. I got better as soon [fol. 114] as I could, we all are working for better as quick as we can now. I made out mighty fine though, I think.

On redirect examination the witness said:

This would make good strawberry land; but I hardly ever mention strawberries. I see so many people get bumped on them; I never mention them. That takes fertilizer and a lot of careful work and aggravation and all like that. There is a right nice bunch of timber growing on this land,—yellow pine, a pretty good growth of it.

Thereupon the defendant to further maintain the issues upon its part produced as a witness P. F. JENKINS, who testified as follows:

My name is P. F. Jenkins. I live about a mile north of Fort Meade. I am assistant superintendent of the Charleston, S. C. Mining and Manufacturing Company. I am a civil engineer; have had experience as civil engineer about nine years. I didn't entirely graduate; I had to leave the college before I graduated on account of my health. I got the base and principals though and dug it out since then. I have a good deal of practical experience. Am familiar with the lands involved in this suit. I have made an examination of them and taken levels with a view of ascertaining whether or not they are capable of drainage; portions of them; the portions that I considered were the lowest. The result of that examination was very satisfactory from a drainage standpoint. In one instance there I found a fall of eight feet and eleven, and in another one I found [fol. 115] seven feet and seven hundredths; in taking into consideration the facts, you can increase that by turning the drainage ditches a little further to the south, I should say you could increase it about four feet four. I would consider that all these lands involved in this suit are capable of practical drainage. I never ran lines in every pond, but I think it could be easily demonstrated by running a level beginning with the first pond and going to the others, but I picked out the lowest. Most of those ponds I considered to be highland ponds. The land is in a saucer, and that naturally holds water.

I think it would be a very inexpensive proposition to drain it. It is not true that you would drain it five or six miles, as testified by some of the witnesses; he testified on account of his eye sight I think, but I doubt very much if he ran the levels. If he ever ran levels he wouldn't talk about draining it in the direction he did. I understand that he said he would have to drain it to Peace River, that would be foolish with this other drainage right at hand. Certainly cutting a ditch I should think that on the lines down in the southeast portion of thirty, a ditch two feet deep about eleven hundred feet long would amply drain that portion of it away, and which seemed to be about the lowest. I picked that out as about the lowest portion. I should think forty dollars would cover the portion of draining that.

On cross-examination the witness said:

As near as I could tell, the bottom of the pond about two feet deep would be the depth of the ditch,—two or three feet. I think I could get that done for forty dollars. This water would go in what is [fol. 116] called Long Bay. A lot of the land is thirty and the land in nineteen and the upper portion of thirty could be drained into this Bull Pond and Cypress Pond, which in turn would go into Long Bay. Long Bay goes into township thirty. If we started to drain this land in question and the owner of the land through which this drain would go should go to the Court and get an injunction, I don't know what we would do, but I don't think it would be enough water to enable them to get an injunction because Long Bay would take so much water that you couldn't tell the water was coming off the land. If a man wanted to have a celery farm, and didn't want this water off of this other land to interfere with his farm, I don't know how far he would have to go; but haven't you got a right to clean out the natural drain on your own land? If the people who owned this land that we are going to drain this water through should object, we would not have to go to Peace River with it. You can go I think, I have forgotten the scale, but you can go about two miles and get about a forty-foot drop. From a legal standpoint draining off of somebody else's land might be getting into a serious proposition, but I don't think in this instance there would be any kick on it judging from the character of the land. If you are draining around your own property and the water running off on the natural drainage, I don't think you would have any kick. My opinion, as a civil engineer, is that it would be possible for every bit of this land to be drained. As to what might have to be done if any legal objection was made, that is a question I cannot answer, beyond the fact that you would have to drain in another direction.

On re-direct examination witness said:

[fol. 117] Long Bay has a natural outlet or drainage; I noticed a natural drainage to it on the southeast end. I don't think there would be any obstacle to the drainage of these particular lands. I

don't think that the drainage of these lands would overflow that natural drainage.

Thereupon Defendant's counsel offered in evidence the deposition of WILLIAM B. CHISHOLM, SR., which in narrative form is as follows, to-wit:

My name is William B. Chisholm, Sr. Age, 57 years. Residence, 20 South Battery, Charleston, S. C. Occupation, President of the Interstate Chemical Corporation. I was Vice-President of Charleston, S. C. Mining and Manufacturing Company during the year 1906 and until about August, 1907. Am only acquainted with the lands in question to the extent of the description given in the title. Am not acquainted with J. E. Hollingsworth; have never known him. I could not and did not induce or procure J. E. Hollingsworth to make the non-mineral affidavit alleged in the bill nor did I have any connection with the making of such affidavit. As Vice-President of the defendant company during the years 1906 and 1907 I had sole control of securing the lands described and which are involved in this suit. While on a trip to Florida a Mr. J. J. Singleton mentioned that he could purchase the lands and recommended their purchase for the purpose of closing in the property which the company owned, as is always the custom, since it is more desirable to hold a solid body of land than to have property held by others within the surrounds of the Company's property. Thereupon I instructed Mr. Singleton to secure the lands, if he could do so, for the [fol. 118] reasons stated. Neither at that time nor thereafter did Mr. Singleton mention anything about any mineral deposits that may or may not have been contained in the land. On behalf of the defendant company I authorized the purchase of the lands involved, and at such time had no reason to believe that the lands contained any phosphate or other mineral deposits. I did not interview any one regarding the mineral contents. I was not aware of any prospecting having been done nor were any prospecting tests submitted to me, nor did I have any information upon which to base any opinion or to arrive at any idea of the mineral contents of said land, phosphate or otherwise, if said lands contained any. The acquirement of said lands was for the purpose of solidifying the holdings of the defendant company and of protecting them from claims and suits and trespassers. As representing the defendant company, nor in any capacity did I make any false, fraudulent or untrue representation and statement, or authorize or allow any such to be made either to the Government or to any of its officers or to the State, or to the State's agent or agents, as to the mineral deposits alleged to be contained in the said land. No other negotiations were conducted by me other than as above set forth, and upon the suggestion of Mr. Singleton that it would be an advantage to the defendant company to acquire these lands, I authorized him to purchases same. No mention was made, nor did I have any reason to believe, that the lands contained or did not contain phosphate or other mineral de-

posits, as this did not enter into the reason actuating the purchase, nor was it brought up or considered in any way by him. I had no information from any source whatever that the lands involved did or did not contain phosphate or other mineral deposits. No mention [fol. 119] was made of it, nor was any information submitted to me in this connection,—the lands being purchased simply for the purpose of securing all the lands surrounded by the property purchased or for which the defendant was negotiating. I did not know at the time of the purchase or while I was connected with the defendant company whether the lands involved in this suit contained phosphate or other mineral deposits. Since the severance of my connection with the defendant company I have had no knowledge of the lands or their contents, and therefore am unable to say what the lands contain, or whether they contain any phosphate or mineral deposit. I did not obtain any information regarding any mineral contents of the land. I repeat that while Vice-President of the defendant company, upon the suggestion and recommendation of Mr. Singleton that it would be an advantage to the company to acquire the lands involved for the purpose of rounding out the holdings of the company and solidifying and protecting the same, I authorized the purchase of the land. For that reason, without any suggestion, knowledge or information as to whether the lands contained mineral or phosphate deposit, which did not enter into and was not considered in any way, I authorized the purchase of the land.

On cross-examination the witness said:

I have no knowledge of the land other than expressed in the title thereof. I may possibly have been on, or crossed the land, on one of my trips to Florida. If I ever had any opportunity of knowing whether the lands contained any deposit of phosphate, I never availed myself of it, for the reason that I never considered the lands as having [fol. 120] any deposit of phosphate, nor did I make any investigation or examination as to the same. The lands were only brought to my attention to be acquired for the purpose of completing and filling out in one body the holdings of the defendant company, and were neither considered or purchased as phosphate lands. I never had any communication, either written or oral, with J. E. Hollingsworth. If I ever had any written communication with E. B. Childers and J. J. Singleton concerning the land, the same are not in my possession. All correspondence relating to the affairs of the Charleston, South Carolina, Mining & Manufacturing Company was turned over by me to the company when I severed my connection therewith some time in the year 1907. According to my recollection it was while on one of my trips to Florida that Mr. J. J. Singleton in person brought to my attention the advisability of purchasing the land for the reasons already set forth herein. I cannot attach copies of any communications, if I received any, for I have no copies thereof. All correspondence that I had as an officer of the company was turned

over to the company. I never knew J. E. Hollingsworth and never had any conversation with him or any communication, oral or otherwise. I was induced to authorize the purchase of the land, which purchase I did not in person negotiate, for the reason that it was brought to my attention on a trip to Florida that it would be advisable to close in the property of the company; that it was more desirable to hold a solid body of land than to have property held by others within the surrounds of the company's property; and for that purpose alone I authorized the purchase of the land if it could be gotten at a figure which in my opinion was reasonable for the company to pay for said purchase for the purposes stated. Accord- [fol. 121] ing to my recollection the company paid $5.00 an acre for the land, but I have no data or record to verify this statement as to a transaction which took place a number of years ago.

It was further stipulated by the parties complainant and defendants herein that wherever in the testimony and exhibits the follow- description occurs, to-wit:

Southeast quarter of the Southeast quarter of Section 30, the same shall be corrected to read as follows:

Southeast quarter of the Southwest quarter of Section 30, Township 32, South, of Range 26 East, and that all testimony as to the said southeast quarter of southeast quarter of Section 30, Township 32, South of Range 26 East, shall be construed to have reference to and shall apply to the southeast quarter of southwest quarter of Section 30, Township 32, South of Range 26 East.

Thereupon the respective parties re-filed all the foregoing testimony before Special Examiner, Governor Hutchinson, pursuant to stipulation.

Thereupon the complainant announced that it rested.

Thereupon the defendant produced and offered as a witness BURDET LOOMIS, JUNIOR, who testified as follows, to-wit:

I reside at Pierce, Florida. Am manager of the phosphate rock department of the American Agricultural Chemical Company. Have [fol. 122] had entire charge of the mining operations of our company since 1912. Am at present engaged in mining pebble phosphate in Polk County. The existence of pebble phosphate in one forty acre tract or one section is not any indication of the existence of phosphate in the adjoining land. The existence of phosphate is not by veins like coal, but is by simply in pockets or strata. For instance, this table is one forty acres of land. It is very often the case that the phosphate will run up to this side of it, and on the north side it will run out. We are mining now in one of our mines. Where Mr. Phillips sits (indicating) is another 40 adjoining the place where we are mining. We absolutely stopped on the 40 line. The deposit runs out so we can't find any at 45 feet deep. We ap-

parently cut down to the bed rock there, and there is no phosphate there, and that is frequently the case. We are mining in another place in one section where the two 40's on the south of where we are mining are barren 40's; that is, without any rock on it at all, going right through to bed rock, no trace of rock. We are mining 5,000 tons to the acre in one section, and in the other section it is just barren. We are covering it with overburden. We have come across places in the same 40 where it would drop right off to nothing. It is very customary for the strata to end more or less abruptly.

On cross-examination the witness said:

The only way to be absolutely sure of a deposit of phosphate is to make several borings and get samples. The customary number of borings to determine absolutely, or as near as possible, is 16 one to every two and a half acres. That is the recognized practice in the [fol. 123] trade. If you buy land ordinarily you buy it on 16 hole prospects. Of course, the 40 lines have nothing to do with marking the boundaries of the deposit. That just happens some times that it might run over just a little piece in the other forty.

Thereupon H. F. GREENE was produced as a witness for defendant and testified as follows:

I reside at Coronet, Florida. Have had experience in the prospecting and mining of pebble phosphate in Polk and Hillsboro Counties, Florida,—13 or 14 years. The fact that rock exists in one forty or in one section is not any indication that its exists in the adjoining land. Some times it runs in a continuous strata, and then some times it runs in pockets. It never runs in a vein like coal. I couldn't say positively of my own knowledge that there has ever been any mining operations up to the present time in the territory of this property, being lands in sections 19 and 30 of 32-26 East of the River.

On cross-examination the witness said:

Have been in the phosphate business since 1906, 14 years. Have been in positions from assistant superintendent up to manager, with various companies. Have had actual experience in examining land for phosphate, ahead of mining operations. I never served as an actual prospector, but the operation is such a simple one that almost anybody could pick it up. I have had no experience in coal mining or examining land for coal deposits.

[fol. 124] Thereupon A. S. MCMILLAN was produced as a witness for defendant and testified as follows:

I live at Charleston Mine, Fort Meade. Am in the employ of Charleston, South Carolina, Mining & Manufacturing Company.

Have had a good deal of experience for the last six and a half years in prospecting, in the mining of pebble phosphate in Florida. The fact that phosphate exists in one subdivision of a section or in a section is no indication of its existence in an adjoining piece of land. It runs in strata or pockets. Some times you will find a sand pocket. We run up against it when mining three weeks ago, went right down to the middle of bed rock, sand deposit, and the rock went out, and we had to leave it, only showed 375 tons in that boring, and it ran out just before we got to Charleston Avenue, going towards Peace River; and sand pockets run now in pockets, and the rock in pockets. Some times you find 18 inches or two feet of rock just over the bed rock, and all the deep part is a sand pocket. There has not been any mining or mining operation of pebble phosphate in the vicinity of this particular land up to the present time even. I don't think there has been any mining east of the river, where this land is located; I have never seen any sign of any, and I have been all over our company's land there, and through other lands between Fort Meade and Frost Proof all up and down the river in every direction, and I have never seen any sign of mining at all. The company has never undertaken to mine rock in this land.

On cross-examination the witness said:

Some times the different kinds or grades of phosphate run down as low as 58. I mean the bone phosphate. Pebble phosphate is [fol. 125] the only phosphate in our territory; that is all I know anything about. There is a hard rock mined in Charleston, big boulders, lumps, bones. Have never seen any rock mined in Polk County except what is called pebble phosphate.

Thereupon J. E. Wainwright was produced as a witness for defendant and testified as follows:

I live in Gainesville, Florida. Am a clerk in the United States District Land Office at Gainesville, Florida. Have been in this office since January 15, 1895. I know B. F. Hampton, State Selecting Agent; have known him 25 years, ever since I lived in Gainesville. I have had the handling of location of the school scrip and other state locations. I am familiar with the regulations of the departments as to the location of school and state scrip. I did handle the location of school selection lists numbers 147 and 148 placing the lands described in this suit under the provisions of section 2275 and 2276 of the revised statutes, made by B. F. Hampton, selecting agent for the State of Florida. Mr. B. F. Hampton, the State Selecting Agent, pursued the same course and did the same acts in the ma-ing of these selections above recited that was usual and customarily done under the requirements of the Interior Department. He complied with all requirements as prescribed by the regulations. The lands involved in this suit were offered for public entry by the

Government April 21, 1879. The records of the United States District Land Office at Gainesville, Florida, show this land as unappropriated public lands, open to homestead and pre-emption entry continuously from that time until the date of the selection by B. F. [fol. 126] Hampton, State Agent, under these certificates of school scrip, with the exception that the State made a swamp selection at one time on one of them. That swamp selection was made in March, 1885, and was rejected October 27, 1903, for the reason that it was not swamp and overflowed land. The mineral laws extended over Florida, April 15, 1890. Up to that time the lands were classed as agricultural lands. Up to that time this land had never been reserved or selected as mineral land. Since such time, of course, we have had two classes, mineral and agricultural lands. It was not customary, there was not any requirement of the Interior Department that there should be any pitting or boring of the land to determine as to its mineral character before making the state selections by the State Agent of its scrip location. The regulation forms required for any mineral and non-occupancy affidavits read that they had personally examined the lands, and from such personal examination there were no indications of minerals of any kind. That is my recollection of it. The State Selecting Agent invariably obtains his nonmineral affidavits by having a third party to go over and examine the lands and make the non-mineral affidavit. All lands of the Government were classed as agricultural and mineral in this State after April 15, 1890, when the mineral laws were extended over Florida. It is true that when these lands were certified to the Secretary of the Interior for public entry they were classified by the Government as agricultural lands, and so treated by the United States District Land Office at Gainesville, Florida. I have the tract book with me. The record shows that during all of these years up until the school selection was made, this property was held and treated and recognized by the United States District Land Office [fol. 127] at Gainesville under the instructions of the Interior Department as agricultural lands. They have since, however, been classified. It is true that the Government plat showed these lands open to public entry as agricultural land up to the time it was selected by B. F. Hampton under the school selection recited in the testimony in this cause.

Counsel for Charleston, South Carolina, Mining & Manufacturing Company offered in evidence official plat of the survey of township 32, South Range 26 East.

On cross-examination the witness said:

The east half of southwest quarter of Section 19, Township 32, South of Range 26 East, were embraced in phosphate reserve No. 5, Florida No. 2 by executive order July 29, 1910.

Mr. Hampton: We object to the examination of the witness in regard to this phosphate reserve because it was subsequent to the selection and actual acquirement of title by Charleston, S. C. Mining & Manufacturing Company from the state.

A. The North half of northwest quarter, and the north half of southwest quarter, and southwest quarter of southeast quarter, Section 30, 32-26, was embraced in phosphate reserve No. 8, Florida No. 2, by executive order of May 16, 1911.

Objected to by counsel for the defendant because it is subsequent to [fol. 128] the selection and actual acquirement of title by Charleston, S. C. Mining & Manufacturing Company from the state.

The Florida number—I couldn't explain what is meant by Florida No. 2. This is a term used by the Commissioner of the General Land Office. And this executive order is the order of the Commissioner of the General Land Office.

Hearing adjourned, and again resumed in the City of Jacksonville on Thursday, June 2, 1921, at 1:30 P. M., and the following further proceedings had:

Thereupon W. W. Hampton, Esq., of counsel for defendant, produced and offered in evidence the original deed made by the State Board of Education of the State of Florida to the defendant, Charleston, South Carolina, Mining and Manufacturing Company, a corporation, conveying the property involved in the suit, said deed being deed number 3645 and dated the eighth of February, 1908.

Admitted, filed and read in evidence, and marked Defendant's Exhibit C.

Whereupon the defendant closed, and the Complainant announced that it had nothing further to offer.

In United States District Court

Judge's Certificate to Statement of Evidence

I, Rhydon M. Call, Judge of the United States District Court for the Southern District of Florida, hereby certify that the foregoing condensed statement of the evidence adduced in this cause in the trial of the same in the United States District Court, contains a true, complete, and properly prepared statement of the testimony [fol. 129] adduced in said cause, and contains all of the evidence excet the Exhibits filed with and attached to the Report of Special Examiner, Gov. Hutchinson, appointed to take the testimony herein. And it further appearing to the Court that said Exhibts cannot well be transcribed, and that it is for the best interests of all parties hereto that the original exhibits be transmitted with the Transcript of the Record, for the examination and use of the Circuit Court of Appeals in the consideration and adjudication of the appeal herein, and counsel for the respective parties consenting hereto; thereupon, upon consideration hereof, it is ordered, adjudged and decreed by the Court that the said exhibits, to-wit: Complainant's Exhibits "A" and "B" and Defendant's Exhibit "C" (being the original

deed made by N. B. Broward, Governor, et als., composing the State Board of Education of the State of Florida, to the Defendant Company, dated the 8th day of February, 1908), Defendant's Exhibit "No. 4" (being photographic copies of the following papers: Certificate of B. F. Hampton, State Selecting Agent for the State of Florida, of date February 19, 1906; Certificate of B. F. Hampton, State Selecting Agent, appointing J. E. Hollingsworth as his agent to make personal examination of the land, dated February 5, 1906; Affidavit of J. E. Hollingsworth that the land is not within six miles of a mining claim, entry or location, dated March 3, 1906; Non-Mineral Affidavit of J. F. Hollingsworth, dated March 3, 1906; List of Indemnity School Selection by B. F. Hampton, State Agent, dated February 12, 1906; Record of filing and approval of List No. 147 General Land Office, Washington, D. C.; Certificate of B. F. Hampton of the basis used in List 147, dated February 12, 1906; B-2 Certificate of Appointment of J. E. Hollingsworth by B. F. [fol. 130] Hampton, State Selecting Agent, February 5, 1906; B-3 Affidavit J. E. Hollingsworth dated March 3, 1906; B-4 Non-Mineral Affidavit J. E. Hollingsworth dated March 3, 1906; B-5 List 148 Indemnity School Selection by B. F. Hampton, State Selecting Agent, dated February 19, 1906; B-6 Certificate List 148 U. S. Land Office; C-1 Approval of List December 11, 1907; C-1½ Letter of the Commissioner certifying approval of List 31, dated December 11, 1907; C-1½ Certificate from the U. S. Land Office December 11, 1907; C-2 Approval of List 31 School Indemnity Lands; C-4 Certificate of Approval by the Commissioner of the General Land Office, December 11, 1907), be transmitted by the Clerk of this Court, with the Transcript of Record to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, to be used by counsel for the respective parties before the Court and by the Appellate Court in the consideration and adjudication of said Appeal; and that the foregoing condensed statement of the Evidence be filed herein, and made a part of the Transcript of the Record as a true, complete, and correct statement of the evidence upon which said cause was adjudicated by this Court.

Done and ordered in open Court at Jacksonville, Florida, on this 16th day of June, A. D. 1924.

Rhydon M. Call, Judge.

Copy received June 14, 1924.

Harry W. Reinstine, Asst. U. S. Attorney.

[fol. 131] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS AS TO DEFENDANT CENTRAL TRUST CO. OF NEW YORK—Filed Jan. 29, 1924

Comes now the plaintiff in the above cause by its attorneys, and respectfully represents unto the Court that the Central Trust Com-

pany of New York, a corporation, party defendant in the above cause by virtue of the certain mortgage executed to it by Charleston S. C. Mining and Manufacturing Company, a corporation bearing date April 1, 1909; that said mortgage has been satisfied of record, a certified copy of the satisfaction whereof is hereto attached and by specific reference made a part of this motion.

Wherefore, plaintiff prays that this Honorable Court dismiss the above cause as to the defendant Central Trust Company of New York, a corporation, and that the cause proceed solely against the Charleston, S. C. Mining & Manufacturing Company.

Respectfully, Wm. M. Gober, Harry W. Reinstine, Solicitors for Plaintiff.

[fol. 132] EXHIBIT TO MOTION TO DISMISS

Central Union Trust Company of New York, Trustee,

to

The Charleston, South Carolina Mining and Manufacturing Company

Whereas under date of April 1, 1909, The Charleston, South Carolina, Mining and Manufacturing Company, a corporation organized and existing under the laws of the State of South Carolina (hereinafter called the "Company"), made, executed and delivered to the Central Trust Company of New York, a corporation organized and existing under the laws of the State of New York, a corporation organized and existing under the laws of the State of New York, as Trustee, a certain Indenture of Mortgage (hereinafter called the "Mortgage") the same being supplemental to a mortgage known as the Virginia-Carolina Chemical Company first Mortgage, to secure an authorized issue of Fifteen Million Dollars ($15,000,—.00) principal amount of the First Mortgage Fifteen Year Five Per cent. Gold Bonds (hereinafter called the "Bonds") of Virginia-Carolina Chemical Company, a corporation organized and existing under the laws of the State of New Jersey (hereinafter called the "Chemical Company"); and

Whereas, the said Central Trust Company of New York duly merged pursuant to the provision of the Banking Law of the State of New York with the Union Trust Company, under the name of the "Central Union Trust Company of New York (hereinafter called the "Trustee") a certificate of merger of said corporations having been duly filed in the office of Superintendent of Banks of the State of New York, and in the office of the County Clerk of the County of [fol. 133] New York, State of New York, on the 18th day of June, 1918; and

Whereas, the Chemical Company has deposited with the Trustee a sum in cash equal to the principal amount of all of such Bonds

issued and outstanding together with the interest payable thereon to maturity; and

Whereas, the Chemical Company has requested the Trustee to execute this satisfaction of the said Mortgage:

Now, therefore, for and in consideration of the premises, and of the sum of Ten Dollars ($10) and of other good and valuable considerations by the Chemical Company to the Trustee in hand paid, receipt whereof is hereby acknowledged,

The Trustee hereby acknowledges satisfaction of the said Mortgage and consents to satisfaction thereof being entered upon the records of any and every office wherein the Mortgage may have at any time been recorded.

In witness whereof this instrument is executed by the duly authorized officers of the Trustee this first day of June, 1922.

Central Union Trust Company of New York, as Trustee as Aforesaid, by M. Ferguson, Vice-President. (Corporate Seal.)

Attest: F. Wolfe, Assistant Secretary.
Witness-: F. E. Egly, E. Barry, F. Wolfe.

[fol. 134] South Carolina Acknowledgment

State of New York,
County of New York, ss:

Personally appeared F. E. Egly, before me, Herbert L. Williams, a Notary Public in and for the County and State of New York, and made oath that he saw M. Ferguson, as Vice-President of Central Union Trust Company of New York, and F. Wolfe, as Assistant Secretary of said corporation, sign, affix the corporate seal of the within named Central Union Trust Company of New York, and as the act and deed of said corporation, deliver the within written instrument for the uses and purposes therein mentioned; and that he, with E. Barry, witnessed the execution thereof and subscribed their names as witnesses thereto.

F. E. Egly.

Subscribed and sworn to before me this 28 day of July, 1922. Witness my hand official seal. Herbert L. Williams, Notary Public. New York Co. Clerk's No. 25. New York Co. Register's No. 3063. Bronx Co. Clerk's No. 12. Bronx Co. Register's No. 21. Term expires March 30, 1923. (Notarial Seal.)

[fol. 135] Florida Acknowledgment

State of New York,
County of New York, ss:

I, Herbert L. Williams, a notary public for the county aforesaid, in the State of New York, do certify that M. Ferguson, whose name

as a Vice-President of Central Union Trust Company of New York is signed to the foregoing instrument, and who is to me known and known to me to be the person who executed the same as said Vice-President, personally appeared before me this day in my county aforesaid and acknowledged the execution thereof to be his free act and deed for and on behalf of and as the act and deed of the said Central Union Trust Company of New York, the corporation named in the foregoing instrument, for the uses and purposes therein expressed.

And I further certify that at the same time and place personally appeared before me F. Wolfe, a subscribing witness to the foregoing instrument, to me known, who, being by me duly sworn, according to law, doth depose and make proof to my satisfaction, that he knows the corporate seal of the said Central Union Trust Company of New York, the corporation named in the foregoing instrument; that the said seal affixed to the said instrument is the proper corporate seal of said corporation; that M. Ferguson was at the time of the execution of said instrument a Vice-President of said Corporation; and that said instrument was signed, sealed and delivered by him as such President, in the presence of the said deponent as the voluntary act and deed of said corporation, and that said deponent thereupon subscribed his name as a witness thereto, all of which I certify.

[fol. 136] In witness whereof I have hereunto subscribed my name and affixed my official seal this the 28th day of July, 1922.

Herbert L. Williams, Notary Public. New York Co. Clerk's No. 25. New York Co. Register's No. 3063. Bronx Co. Clerk's No. 12. Bronx Co. Register's No. 21. Term expires March 30, 1923. (Notarial Seal.)

Tennessee Acknowledgment

State of New York,
County of New York, ss:

Before me, Herbert L. Williams, a notary public in and for the County of New York, in the State of New York, aforesaid, personally appeared M. Ferguson, with whom I am personally acquainted and who, upon oath, acknowledged himself to be a Vice-President of Central Union Trust Company of New York, the within named mortgagee, a corporation, and that he as such Vice-President, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself as Vice-President.

Witness my hand and seal at my office in the City of New York, in the State of New York, this 28 day of July, 1922.

Herbert L. Williams, Notary Public. New York Co. Clerk's No. 25. New York Co. Register's No. 3063. Bronx Co. Clerk's No. 12. Bronx Co. Register's No. 21. Term expires March 30, 1923. (Notarial Seal.)

[fol. 137] STATE OF NEW YORK,
County of New York, ss:

No. 15533, Series B

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That Herbert L. Williams, whose name is subscribed to the depositions or certificates of the proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such depositions or proofs and acknowledgments a Notary Public in and for such county, duly commissioned and sworn, and authorized by law of said State to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York, and further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signatures to said depositions or certificates of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 3 day of August, 1922.
James A. Donegan, Clerk. (Clerk's Seal.)

Filed Aug. 15, 1922, at 11:25 A. M. J. D. Raulerson, Clerk Circuit Court.

[fol. 138] STATE OF FLORIDA,
County of Polk:

I, J. D. Raulerson, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing is a true and correct copy of release of mortgage signed by Central Union Trust Company of New York, as Trustee, to The Charleston, South Carolina, Mining and Manufacturing Company, as the same now appears of record in Satisfaction of Mortgage Book "105," page 153, public records of said County.

Witness my hand and official seal this December 12, A. D. 1923.
J. D. Raulerson, Clerk Circuit Court. (Seal.)

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

On January 29, 1924, the Court made its order dismissing the Amended Bill as to Central Trust Company of New York.

On May 26, 1922, Gov. Hutchinson, Special Examiner made his report in said cause.

[fol. 139] IN UNITED STATES DISTRICT COURT

[Title omitted]

SETTING OF CAUSE FOR FINAL HEARING—Filed Nov. 9, 1923

Come now the Defendants, by their attorneys, and set this cause down for final hearing upon the pleadings, proofs and Special Examiner's Report, and the Stipulation of Counsel, in accordance with the Rules.

This 8th day of November, A. D. 1923.

Hampton & Hampton, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S OBJECTIONS TO TESTIMONY—Filed May 5, 1924

Comes now the defendant, Charleston, S. C., Mining & Manufacturing Company, by its attorneys, and the issues and parties having [fol. 140] been changed by Order of the Court this day made dismissing as to defenadnt, Central Union Trust Company of New York, and file the following exceptions to the testimony of the witnesses, respectively, both as to questions and answers, some of which appear in the record and some do not appear in the record, and request a ruling of the Court thereon as to each exception:

1. Defendant's counsel object to the following questions propounded by the District Attorney to the witness, E. R. Childers, and the answer thereto, at page 8 of the testimony, to-wit:

"Q. State as near as you can what you wrote S. D. Crenshaw?

A. I cannot do that. I cannot give you the date; but what I did. I wrote to them asking them if they would become interested in mining claims with me on certain lands; they could not be bought for any other use, but they contained phosphate."

For the reasons set forth in the record, to-wit:

Mr. Hampton: We move to strike the testimony of the witness because it is not competent for the witness to testify as to the contents of any letter written by him to them, or to Mr. Crenshaw, or to any other officer of this Defendant Company or any allied Company, without first laying the foundation for it and permitting us to produce the letter, if we are in possession of it, if properly identified. Does not identify lands referred to.

2. Defendant's counsel move to strike and exclude the following question and answer propounded to the said witness, E. R. Childers, to-wit:

[fol. 141] "Mr. Phillips:

Q. Now, did you get a reply to those letters?

A. Yes, sir. They say they would not become interested at all."

Because it is incompetent for the witness to testify as to the contents of any letter or other writing without laying the foundation therefor.

3. Defendant's counsel move to strike the following question and answer appearing at page 9 of the testimony, to-wit:

"Q. What did they write to you?

A. I just started to tell it. They wrote me that they would not become interested in it at all and I sent them a Plat of that Government land. I was just trying to get up a correspondence with them. That was all I was trying to do"

Because it is incompetent for the witness to testify as to the contents of any letter or other writing without laying the foundation therefor.

4. Defendant's counsel move to strike the following question, to-wit:

"Q. Go ahead and state now what you wrote to him about the phosphate?"

They also move to strike the answer, for the reasons stated in the record, to-wit:

It is shown that the witness made no verbal representation, it already appearing that the alleged negotiations with Mr. Crenshaw [fol. 142] are in writing and the writing must either be produced or the proper foundation laid to have them produced before any secondary evidence is admissible as to the contents thereof:

"A. That is what I told you and they object to it.

5. Defendant's counsel move to strike the following questions and answers, to-wit:

"Mr. Phillips:

Q. I am talking about when you send him the Plats.

A. That was several years ahead of that and I sent them that Government Land, Section 30 and Section 19, and asked them to join me in——

Q. Is this the same thing you have talked about before? Is this the only time you had anything?

A. Yes. He promptly turned me down and I let it go. That was all. He may have not looked at that plat so far as I know."

Because there is no proof that Mr. Crenshaw ever received the Plat or ever saw it, no proof that the witness ever mailed the letter or stamped it, no proof to show where he mailed the letter from, and no foundation laid for the introduction of such testimony.

6. Defendant's counsel move to strike the following question and answer of the witness E. R. Childers, at page 11 of the testimony, to-wit:

"Q. Was he the agent of the Company,—the Virginia Carolina Chemical Company—at that time?

A. Yes, he said he was. I do not know."

[fol. 143] Also, the following question and answer, to-wit:

"Q. Well, he held himself out to be, Mr. Childers, that is all? A. Yes sir."

Because the Virginia-Carolina Chemical Company is not a party to this suit.

(a) No foundation laid therefor.

(b) You cannot prove agency by the agent himself.

(c) Because the witness testified that he had no conversation with Mr. Chisholm in regard to this land.

(d) It is not shown that the witness had any communication with Mr. W. B. Chisholm, verbal or in writing.

7. Defendant's counsel move to strike out all the testimony of the witness, E. R. Childers, in regard to the contents of the lands involved in this suit:

Because the witness testified that he did not analyze the rock and knew nothing as to the quantity of the rock in the land.

(a) Because he has not identified any part of the land.

(b) Because the witness, E. R. Childers, testified on page 24 of the testimony on re-direct examination by the District Attorney: "I was boring approximately over all the territory you know, and I would not say I bored this forty or that one."

[fol. 144] (c) Because he testified on page 24, that he did not bore the N. E. ¼ of the S. W. ¼ of Section 19; and further testified at page 25: "I do not think, however, I bored on any of this forty. I have a report, but I was not present when that boring was made."

(d) In another answer he says: "It was my man boring for me. I was not present. I did not go there and see the place afterwards. I do not know that I ever made a boring on any of these particular sections." And on page 26 he testified that he did not bore on Section 29 at all."

8. Defendant's counsel move to strike out all of the testimony of the witness, E. R. Childers, in regard to the contents of the lands involved in this suit:

Because the witness testified that there never had been any rock mined in Sections 19 and 20, or in the neighborhood of said lands, and that the nearest plant was across the river two miles and a half on the West side of the River, and there had never been any mining in the vicinity of the lands involved.

9. Counsel for defendant move to strike from the evidence the map filed in evidence as Plaintiff's Exhibit "B":

(a) Because it is not shown that the witness who made and identified the same had had any experience in the examination of phosphate lands in Florida.

(b) The examination, as testified by the witness Sears, was not sufficiently carried out to enable the Court to determine as to the [fol. 145] quantity or quality of phosphate that was contained, if any, in the lands involved in this suit.

(c) Because the examination upon which the Plat is predicated was made many years after the selection and certification of the

lands to the State, and after the sale of the lands by the State to the Defendant.

10. Counsel for defendant moves to strike all of the testimony of the witness, Mortimer H. Sears, touching the quality and quantity of phosphate alleged to have been contained in the lands involved in the suit:

(a) Because the witness has not shown that he has had any experience in the examination of phosphate lands in Florida.

(b) The examination of the property by the Witness was not sufficient to enable the Court to determine as to the quantity or quality of phosphate alleged to be contained in said land.

(c) Because the examination by the witness of the lands involved was made many years after the location and certification of the lands by the Government to the State of Florida, and after the sale of the lands by the State of Florida to the Defendant, and several years after the institution of the instant suit.

11. Defendant's counsel move to strike the Analyses of Dr. Pratt, which were filed in evidence as Plaintiff's Exhibit "C":

(a) Because the Analyses were taken and made many years after the location of the lands and the certification of the same to [fol. 146] the State, and many years after the State had conveyed the lands to the Defendant, and long after the commencement of the instant suit and in fact, months after the taking of testimony in this case.

(b) Because there is no evidence to show that the Defendant, or any of its agents or employees, were cognizant of the existence of said phosphate at the time of the location of this land, at the time of the certification thereof to the State, or the time of the purchase of the land from the State.

(c) Because the testimony of the witness shows that the phosphate was not of a merchantable quality and had no commercial value.

12. Defendant's counsel move to strike the testimony of R. C. Langford at pages 25 and 26 of the testimony of June 10, 1915, in relation to the conversation alleged to have been had with Mr. W. B. Chisholm:

Because said conversation occurred, as stated by the witness, four or five years before the witness testified, which would have been 1911, which is five years after the lands were located by the State and certified to the State, and more than three years after the Deed was made by the State to the Defendant Company.

13. Defendant's counsel object to the testimony of the witness, R. C. Langford, as to any conversation with Mr. Chisholm:

(a) Because there is not sufficient definiteness about the con- [fol. 147] versation.

(b) Because it is now shown in said conversation that the witness informed Mr. Chisholm that the lands contained any definite quantity of phosphate or any definite quality of phosphate.

(c) Because said testimony is vague, indefinite and uncertain.

15. Counsel for the Defendant move to strike all the testimony in relation to the alleged deposits of phosphate and the analysis thereof:

(a) Because such testimony is wholly irrelevant to the issues in this case.

(b) Because the State of Florida acquired the right to select these lieu lands on account of the loss of Section 16, under the Act of March 3, 1845 (U. S. Stat. at Large, Vol. 5, pg. 788), which Act of Congress created a compact between the Federal Government and the State of Florida, and under said compact the State of Florida had a right to select any lands within the State that were open and unappropriated, whether they contained minerals or did not contain minerals.

16. Counsel for the Defendant will move the Court to strike from the testimony the certified copy of Mortgage executed by Charleston, S. C., Mining & Manufacturing Company April 1, 1909, to the Central Trust Company of New York, which is recited in Paragraph 6 of Complainant's Amended Bill, and which was filed in evidence May 8, 1915. Also, the depositions of E. Francis Hyde and Frederick J. Fuller, filed in evidence September 28, 1920; and all testi-[fol. 148] mony in relation to the said Mortgage, the Court having dismissed the Bill as to the mortgagee upon motion of counsel for the Plaintiff.

W. W. Hampton, W. W. Hampton, Jr., E. B. Hampton, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Hampton & Hampton, of Gainesville, Florida, (Wilson & Swearingen, of Bartow, Florida, on the Brief), for Defendants.

Wm. M. Gober, U. S. Attorney, and Harry W. Reinstire, Asst. U. S. Attorney, for the United States.

OPINION—Filed May 5, 1924

CALL, District Judge:

On October 13th, 1914, the complainant filed its bill to set aside the approval of the Secretary of the Interior of certain selections of land made by the State of Florida for lands in lieu of school lands granted to the State of Florida by Act of Congress, Chapter 75, Act of March 3rd, 1845, and declare the title void derived from the State under such approved lists by the defendant, to the East half of the

South West quarter and the North West quarter of the South East [fol. 149] quarter of Section 19; and the North half of the North West quarter, the North half of the South West quarter, and the South East quarter of the South East quarter of Section 30, all in township 32, South, Range 26 East of the Tallahassee Meridian, chiefly valuable for phosphate deposits thereon. The ground for relief prayed is that the defendant perpetrated a fraud upon the officers of the Government in procuring the approval of the lists under which the title to the particular lands was divested out of the United States and vested in the defendant through the deed from the Board of Education of the State.

The defendant answered the bill denying that it had been guilty of the fraud alleged and putting in issue that fact that the lands were chiefly valuable on account of the phosphate deposits upon them. The defendant also alleged that a Trust Company was a necessary party by reason of a deed of trust executed to secure the payment of a bond issue, covering these particular lands, with others. Testimony was taken and a decree entered September 6th, 1916. From this decree the defendant sued out an appeal to the Circuit Court of Appeals, which Court reversed the decree of the Lower Court because the Trust Company, trustee under the deed of trust, was not made a party and remanded the cause.

Thereupon, the Trust Company was made a party defendant and answered the bill. The parties, by stipulation, in order to save expense of re-taking the testimony, agreed that the testimony theretofore taken should be re-introduced, subject to objections which might be made as to its admissibility, and only a small amount of additional testimony was taken by the defendant. Prior to the present hearing the deed of trust was satisfied and the Trust Company thus becoming an unnecessary party, an order of dismissal was ob- [fol. 150] tained as to it. At the hearing the defendant asked leave to amend its answer, which was granted and the amendment made. This amendment raises the question whether the State of Florida had the right, under the Act of March 3rd, 1845, granting the 16th section in each township to the State for school purposes, to select phosphate lands in lieu of school lands lost. The contention of the defendant being that the Act granted to the State every 16th section whether mineral or purely agricultural, and in case of loss the State had the right to select from vacant lands of the United States other lands, without reference to the character of the land selected. On the argument I was much impressed by this contention, but after carefully considering the case of United States vs. Sweet, Admr., 245 U. S. 563, and applying the principle announced in that case, I am of opinion that such contention is untenable. Mr. Justice Van Devanter on page 567, uses this language: "In the legislation concerning the public lands it has been the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal save under laws specially including them. This practice began with the ordinance of May 20, 1785, 10 Journals of Congress,

Folwell's Ed., 118, and was observed with such persistency in the early land laws as to lead this Court to say in United States v. Gratiot, 14 Pet. 526, "It has been the policy of the government, at all times in disposing of the public lands, to reserve the mines for the use of the United States," and also to hold in United States v. Gear, 3 How. 120, that an act making no mention of lead-mine lands and providing generally for the sale of "all the lands" is certain new land districts, "reserving only" designated tracts, "any law of Congress heretofore existing to the contrary notwithstanding," [fol. 151] would not be regarded as disclosing a purpose on the part of Congress to depart from "the policy which has governed its legislation in respect to lead-mine lands," and so did not embrace them. A like practice prevailed in respect of saline lands, and in Morton v. Nebraska, 21 Wall. 660, where a disposal of such lands in certain Territories was drawn in question, this Court said that it could not be supposed "without an express declaration to that effect" that Congress intended by such an act to permit the sale of saline lands and thus depart from "a long-established policy by which it had been governed in similar cases."

The language of the Act is broad enough to cover mineral lands were it not for the policy of Congress as determined by the Acts. The acts showing this policy are referred to by the Supreme Court in a foot-note at the bottom of page 568, covering the period from 1796 to 1841, prior to the grant of lands to Florida. The Act of 1845 does not indicate an intention on the part of the Congress to include mineral lands. Under the principle announced by the Court in the above case it can make no difference that the Act refers to some concession made by the State.

The defendant at the hearing moved the Court to sustain objections to testimony as set forth in its motion. The first five objections and motions to strike refer to the testimony of the witness Childers as to contents of written communications to Crenshaw, one of the officers of defendant, concerning the lands in Section 19 and 20. While the orderly procedure would have been to give notice to defendant to produce the documents before attempting to give in evidence the contents by oral testimony, yet in this case, I do not think the testimony damages the defendant to any extent. The only effect [fol. 152] of such testimony was to show the witness had opened a correspondence with Crenshaw with a view of interesting the defendant in the lands. The decision of the question involved in the case would not, in the view I take of the case, be affected. However, the objections are well taken and the motions will be granted.

The 6th motion refers to the evidence of Childers as to conversations with Chisholm. This objection would be well taken were it not that Chisholm testified that he was a vice-president of the defendant. The 7th motion goes to the weight to be attached to Childers' testimony, not to its admissibility. The 8th is as to all of the testimony of Childers. Some of the testimony given by this witness was admissible and this motion must be denied. The 9th motion is as to the Map, Exhibit B. This motion will be denied. The 10th, 11th, 12th, 13th, 14th, and 15th motions are directed

to testimony of different witnesses who testified to examinations of the lands, analysis of the phosphate rock, found on the land after suit was brought. One of the issues in the case was whether the lands contained phosphate and were chiefly valuable as phosphate lands, the testimony objected to was admissible to sustain this issue. The 16th motion is as to the testimony taken to show the interest of the Trust Company. This motion is granted. The motions numbered 1, 2, 3, 4, 5, and 16 will be granted.

There are two issues to be tried in this case. First—is the land most valuable for the phosphate deposits on the land? This question it seems to me must be answered in the affirmative as to lands described in the bill except the South East quarter of the South East quarter of Section 30. There is no testimony to show phosphate deposits on that portion of the section. The second issue is,—[fol. 153] Did the defendant know or have good reason to believe the lands were most valuable for the phosphate deposits upon them, and were they acquired for that reason? Taking into consideration the business of the defendant; that Capt. Singleton was its agent on the ground, prospecting for phosphate, [illegible]ing lands to his principal for purchase; the circumstances of the inauguration of steps by which these lands were acquired; the very small price paid for these lands as compared to the price paid for lands acquired by the defendant in the neighborhood of these lands; the view of others in that neighborhood as to the character of these lands; it impresses me that this defendant must have been cognizant of the condition of the lands before purchasing them. If it was, then it was a fraud upon the United States to thus procure the divesting of the title of the United States. Why should Capt. Singleton have gone to Stewart in the first instance, when his communication to Hampton would have accomplished the same results, unless possibly Mr. Hampton might have been cognizant of his connection with defendant and thus brought about an examination of the land which would have shown whether it was mineral or not, instead of riding over the lands with the witness who made the affidavit that the land was non-mineral, when Singleton knew such an examination was absolutely worthless to show whether the lands contained phosphate. Why conceal the fact from Hampton that the defendant was the interested party? The principles announced in Diamond Coal Company v. United States, 233 U. S. 236, when applied to the evidence in this case is decisive of the question here involved. The evidence is rather voluminous and I have not attempted a discussion of it, but from a careful consideration of all of it, except that of Childers in reference to the contents of letters [fol. 154] he said he had written, I feel constrained to find that complainant should have a decree as prayed, to all the lands described, except the South East quarter of the South East quarter of Section 30.

It will be so decreed.

Rhydon M. Call, Judge.

At Jacksonville, Florida, this 5th day of May, 1924.

IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—Filed June 3, 1924

This cause came on to be heard at this time and was argued by counsel and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

Paragraph One. It is ordered, adjudged and decreed that the prayer of the bill of complaint be, and the same is hereby granted, except as to the Southeast Quarter (S. E. ¼) of the Southeast Quarter (S. E. ¼) of Section Thirty in Township Thirty-two South, Range Twenty-six East, and as to the said tract of land the bill of complaint is hereby dismissed.

Paragraph Two. It is further ordered, adjudged and decreed that the approval granted by the complainant's Secretary of the Interior [fol. 155] to the certified list of lands described below, issued by the Complainant's Commissioner of the General Land Office, and the deed executed by the State Board of Education to the State of Florida to the defendant, purporting to convey title to the said lands, to-wit the East Half of the Southwest Quarter, the Northwest Quarter of the Southeast Quarter of Section Nineteen, the North Half of the Northwest Quarter, and the North Half of the Southwest Quarter and the South east quarter of the Southwest quarter of Section Thirty, all in Township thirty-two South, Range twenty-six East of the Tallahassee Meridian, in the State of Florida, be, and each of them is hereby declared to be null and void and are hereby cancelled, set aside and held for naught.

Paragraph Three. And it is further ordered, adjudged and decreed that the Defendant, Charleston, South Carolina, Mining and Manufacturing Company, a corporation, has no right, title, interest or estate in said lands described in paragraph Two of this decree, and the said lands described in said Paragraph Two are hereby declared to be clear and free from any and all cloud or clouds thereon by reason of the certification and approval above mentioned, or by reason of said deed from the State Board of Education of the State of Florida to the said defendant and the title to said lands is hereby declared to be in the United States of America, the complainant herein, free and clear of any right, title, interest or estate of the defendant, or any one claiming through or under it.

For further assurance, it is ordered, adjudged and decreed that the defendant do forthwith make, execute, acknowledge and deliver to the United States Attorney for the complainant a good and suffi- [fol. 156] cient deed, reconveying to the United States all and singular the lands above described in Paragraph Two of this decree.

It is further ordered, adjudged and decreed that the Complainant, United States of America, recover from the defendant, Charleston,

South Carolina, Mining and Manufacturing Company, a corporation, its costs and disbursements incurred in this cause.

Done at Jacksonville, Florida, this 3rd day of June, A. D. 1924.

Rhydon M. Call, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed June 12, 1924

To the Honorable Rhydon M. Call, District Judge for the Southern District of Florida:

The above named defendant feeling itself aggrieved by the final decree made, filed and entered in this cause on the 3rd day of June, [fol. 157] A. D. 1924, does hereby in open Court file and enter its Appeal from said Decree to the Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and it prays that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at the City of New Orleans, in the State of Louisiana.

And your Petitioner further prays that proper order touching the security to be required of it, to perfect its Appeal, and for Supersedeas, be made.

This June 11th, A. D. 1924.

W. W. Hampton, W. W. Hampton, Jr., E. B. Hampton, Wilson & Swearingen, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

And now, to-wit, on this 12th day of June, A. D. 1924, it is ordered that the Appeal as above prayed for, be, and is hereby allowed; and that said Appeal do operate as a Supersedeas upon the Defendant, or someone in its behalf, giving good and sufficient security in the sum of Five Thousand Dollars, the Bond to be approved of by the Clerk of this Court, conditions that the Defendant shall prosecute its said Appeal to effect and answer all damages and costs, should the said decree be affirmed or the said Appeal be dismissed.

[fol. 158] Done and ordered in open Court at Jacksonville, Florida, on this 12th day of June, A. D. 1924.

Rhydon M. Call, Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 12, 1924

And now on this the 11th day of June, A. D. 1924, comes the defendant by its attorneys W. W. Hampton, W. W. Hampton, Jr., E. B. Hampton and Wilson & Swearingen, and says that the Final Decree filed and entered in the above styled cause on the 3rd day of June, A. D. 1924, is erroneous and unjust to the defendant, and Defendant assigns the following errors, to-wit:

1. The Court erred in overruling and denying the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 13th, 22nd and 23rd grounds of the Motion to Dismiss Plaintiff's Amended Bill, and each of them, reserved and insisted upon in the Answer of this Defendant to Plaintiff's Amended Bill of Complaint filed herein May 4, 1918, under the provisions of Equity Rule 29, for the reasons set forth and contained in said Motion and each ground thereof.

[fol. 159] 2. The Court erred in overruling and denying the 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th and 15th grounds of the Motion to Strike, and each of them, filed in writing by the Defendant's counsel at the hearing of this cause, for the reasons set forth in each and every of the grounds of said Motion.

3. The Court erred in not limiting the investigation in this cause to the condition and situation of the property and the parties at the time and date of the location of the lands by the State Selecting Agent and certification thereof by the Government to the State of Florida.

4. The Court erred in holding and finding that "the prayer of the bill of complaint be, and the same is hereby granted, except as to the Southeast quarter (S. E. ¼) of the Southeast quarter (S. E. ¼) of Section Thirty in Township Tirty-two South, Range Twenty-six East, and as to the said tract of land the bill of complaint is hereby dismissed."

5. The Court erred in holding and finding that "the approval granted by the Complainant's Secretary of the Interior to the certified list of lands described below, issued by the complainant's Commissioner of the General Land Office, and the deed executed by the State Board of Education to the State of Florida to the defendant, purporting to convey title to said lands, to-wit, the East Half of the Southwest Quarter, the Northwest quarter of the Southeast quarter

of Section Nineteen, the North Half of the Northwest quarter, and the North Half of the Southwest quarter and the Southeast quarter of the Southwest quarter of Section Thirty, all in Township Thirty-[fol. 160] two South, Range Twenty-six East of the Tallahasse Meridian, in the State of Florida, be, and each of them is hereby declared to be null and void and are hereby cancelled, set aside and held for naught."

6. The Court erred in holding and finding that "the defendant, Charleston, South Carolina, Mining and Manufacturing Company, a corporation, has no right, title, interest or estate in said lands described in Paragraph Two of this decree, and the said lands described in said Paragraph Two are hereby declared to be clear and free from any and all cloud or clouds thereon by reason of the certification and approval above mentioned, or by reason of said deed from the State Board of Education of the State of Florida to the said Defendant and the title to said lands is hereby declared to be in the United States of America, the complainant herein, free and clear of any right, title, interest or estate of the defendant, or any one claiming through or under it."

7. The Court erred in requiring the Defendant to "forthwith make, execute, acknowledge and deliver to the United States Attorney for the complainant a good and sufficient deed, reconveying to the United States all and singular the lands above described in Paragraph Two of this Decree."

8. The Court erred in taxing up the costs and disbursements in this cause against the Defendant.

9. The Honorable District Judge erred in his findings of the 5th of May, 1924.

[fol. 161] 10. The Honorable District Judge erred in finding that the lands involved are most valuable for the phosphate deposits on the land.

11. The Honorable District Judge erred in holding and finding that the Defendant knew, or had good reason to believe, that the lands were most valuable for the phosphate deposits upon them, and that they were acquired for that reason.

12. The Honorable District Judge erred in holding and finding that the Defendant committed a fraud upon the United States in procuring the divesting of the title to said property from the United States.

13. The Court erred in making and entering Final Decree herein on June 3, 1924, as appears in the record.

Wherefore the Defendant prays that the said Decree be reversed, and that the District Court be directed to dismiss the Amended Bill of Complaint of the Plaintiff herein.

W. W. Hampton, W. W. Hampton, Jr., E. B. Hampton, Wilson & Swearingen, Attorneys for Defendant.

I acknowledge and accept service of a copy of the above and foregoing Assignment of Errors on this 14th day of June, A. D. 1924.
Harry W. Reinstine, Attorney for Plaintiff.

[fol. 162] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 12, 1924

The Defendant, Charleston South Carolina Mining and Manufacturing Company, having entered its Appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and said Appeal having been allowed by the Court, the Clerk of the District Court for the Southern District of Florida is requested and directed at once to make up and certify transcript of the record, and to incorporate in and make a part of the said Transcript of Record in this cause on Appeal to the said Circuit Court of Appeals, the following papers and proceedings, to-wit:

1. The Amended Bill of Complaint, filed March 6, 1918.

2. The Answer of the Defendant, Charleston, S. C., Mining and Manufacturing Company, to the Amended Bill of Complaint, filed May 4, 1918.

3. The Order or Decree made May 13, 1924, as of May 29, 1919, ruling upon Motion to Dismiss Amended Bill of Complaint filed May 14, 1924.

[fol. 163] 4. Motion made by Defendant, Charleston, S. C., Mining & Manufacturing Company, for leave to file Amended Paragraph Three of Answer of said Defendant, made April 16, 1924, and Order granting same.

5. Amended Paragraph Three of the Answer of Defendant, filed by leave of the Court April 29, 1924.

6. Order made and filed August 2, 1920, appointing Governor Hutchinson, Esquire, as Special Examiner to take testimony and report to the Court.

7. Condensed Statement of the Evidence taken in the cause as certified by the Court.

9. Motion made by Plaintiff's Attorneys to dismiss as to the defendant, Central Trust Company of New York, a corporation, and the Exhibit thereto.

10. Order setting down cause for Final Hearing.

11. Objections to the testimony of certain witnesses and Motion to Strike the Testimony of witnesses presented at the Final Hearing.

12. Opinion of Honorable Rhydon M. Call, District Judge, made May 5, 1924, and filed May 5, 1924.

13. Final Decree rendered, filed and entered June 3, 1924.

14. Entry of Appeal and Order allowing the same, filed June 12, 1924.

15. Assignment of Errors, filed June 12, 1924.

16. This Præcipe.

[fol. 164] Omit the original Bill and Answer, and all pleadings of Central Trust Company, other papers in former Appeal, all Notices and other papers not herein directed to be copied.

In making up the Transcript, you will recite the filing of the original Bill of Complaint against the defendant, Charleston, S. C., Mining & Manufacturing Company; the issue of Subpœna and service thereon upon said Defendant; the filing of the Answer to the Original Bill by said Defendant, November 13, 1914; the Order of Reference to R. C. Dowling, Special Examiner; Agreement and Order extending time for taking testimony; the filing of the Report of Special Examiner; R. C. Dowling; Final Decree rendered September 6, 1916; the Entry of Appeal to the Circuit Court of Appeals and the filing of the Mandate reversing the Decree of September 6, 1916; the filing of the Answer of the Defendant, Central Trust Company of New York, June 3, 1918, and the Amended and Supplemental Answer of the Central Trust Company of New York, May 1, 1921; the dismissal of the Amended Bill as to Central Trust Company of New York, and the filing of the Report of Special Examiner, Governor Hutchinson.

You will transmit to said Circuit Court of Appeals the said certified transcript and the original Exhibits, in accordance with the order of Court directing the same.

W. W. Hampton, W. W. Hampton, Jr., E. B. Hampton, Wilson Swearingen, Attorneys for Defendant (Appellant).

[fols. 165-167] We, W. M. Gober, U. S. District Attorney for the Southern District of Florida, and Harry W. Reinstine, Assistant U. S. District Attorney for said District, and Solicitors of Record for the Plaintiff (Appellee) in this cause, hereby acknowledge and accept service of a copy of the foregoing Præcipe on this 16th day of June, A. D. 1924.

Harry W. Reinstine, Asst. U. S. District Attorney for the Southern District of Florida. —— ——, Asst. U. S. District Attorney for the Southern District of Florida, Solicitors of Record for Plaintiff (Appellee).

Bond on Appeal for $5,000.00—Approved and filed June 16, 1924; omitted in printing

---

[fol. 168] In United States District Court

Clerk's Certificate

United States of America,
Southern District of Florida:

I, Edwin R. Williams, Clerk of the United States District Court, in and for the Southern District of Florida, do hereby certify that the foregoing pages numbered from One to 157 inclusive, contain a true and correct transcript of the record in the matter of Charleston, South Carolina, Mining and Manufacturing Company, a Corporation appellant, vs. United States of America, appellee, as directed to be included in said transcript from the original record and files of said cause.

Witness my hand and the official seal of said Court this 26th day of July, 1924.

Edwin R. Williams, Clerk, U. S. District Court. (Seal.)

[fol. 169] In United States Circuit Court of Appeals for the Fifth Circuit

No. 4100

Charleston, South Carolina, Mining and Manufacturing Company

versus

United States of America

Argument and Submission—Jan. 12, 1925

On this day this cause was called, and, after argument by W. W. Hampton, Esq., for appellant, and Harry W. Reinstine, Esq., Assistant United States Attorney, for appellee, was submitted to the Court.

[fol. 170] In United States Circuit Court of Appeals

[Title omitted]

W. W. Hampton and W. W. Hampton, Jr. (Wm. Wade Hampton, Fred J. Hampton, Edwin Birkett Hampton and Wilson & Swearingen, on Brief) for Appellant.

Wm. M. Gober, U. S. Atty., Maynard Ramsey, Asst. U. S. Atty., and Harry W. Reinstine, Asst. U. S. Atty., for Appellee.

Before Walker and Bryan, Circuit Judges, and Dawkins, District Judge

OPINION—Filed February 7, 1925

Per CURIAM:

The judgment in this case is affirmed upon the opinion of the District Judge.

[fol. 171] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Feb. 7, 1925

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed.

[fol. 172] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed April 6, 1925

To the Honorable Richard W. Walker, Presiding Judge, or any Associate Judge of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the Charleston, South Carolina, Mining and Manufacturing Company, appellant, by its solicitors and complains that in the record and proceedings, and also in the rendition of the decree of the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, in the State of Louisiana, in the above styled and numbered cause, on the 7th day of February, A. D. 1925, affirming the decree of the United States District Court for the Southern District of Florida made and entered in said cause on the 3rd day of June, A. D. 1924, manifest error has intervened to the great damage of the petitioner; that the jurisdiction of the Circuit Court of the United States for the Southern District of Florida depended upon the fact that this is a suit of a civil nature, in equity, brought [fol. 173] by the United States of America against the Defendant Company; that the amount involved therein and the matter in controversy exceeds the sum of One Thousand ($1,000.00) Dollars,

besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore petitioner prays for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States and petitioner prays for a supersedeas of said judgment and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

(Signed) Wm. Wade Hampton, Fred J. Hampton, Edwin B. Hampton, Attorneys for Appellant.

Appeal and supersedeas allowed, and bond fixed in the sum of Five Thousand ($5,000.00) Dollars, conditioned as the laws direct, this the 6th day of April, A. D. 1925.

(Signed) R. W. Walker, U. S. Circuit Judge.

[fol. 174] In United States Circuit Court of Appeals

[Title omitted]

Assignments of Error—Filed April 6, 1925

The above named Appellant, Charleston, South Carolina, Mining and Manufacturing Company, makes and files the following Assignment of Errors to the decision of the Circuit Court of Appeals for the Fifth Circuit, made and rendered herein the 7th day of February, A. D. 1925.

1. The Court erred in affirming the decree of the District Court for the Southern District of Florida made and rendered in this cause on the 3rd day of June, A. D. 1924.

2. The Court erred in not reversing the decision of the trial court and in failing to order the dismissal of Plaintiff's Amended Bill of Complaint.

3. The Court erred in holding that the State of Florida did not [fol. 175] have the right under the Act of Congress of March 3, 1845 (5 Stat. L. p. 788) to select any lands within the State that were open and unappropriated whether they did or did not contain minerals.

4. The Court erred in holding that the State of Florida was not entitled to locate and select the lands involved as Indemnity school Selections under the Act of March 3, 1845 (U. S. Stat. L. Vol. 5, p. 788) known as the School Grant to the State of Florida, and under the Act of Congress of February 26, 1859, (11 Stat. L. p. 385).

5. The Court erred in granting the prayer of the bill of complaint except as to the Southeast quarter (S. E. ¼) of the Southeast quarter (S. E. ¼) of Section Thirty in Township Thirty-two South, Range Twenty-six East, as to which said tract of land the bill of complaint was dismissed.

6. The Court erred in holding to be null and void the approval of the Secretary of the Interior to the certified list of lands located by the State of Florida and issued by the Commissioner of the General Land Office, and the deed executed by the State Board of Education of the State of Florida to the Appellant conveying title to said lands, towit, the East Half of the Southwest Quarter, the Northwest Quarter of the Southeast Quarter of Section Nineteen, the North Half of the Northwest Quarter and the North Half of the Southwest Quarter and the Southeast Quarter of the Southwest Quarter of Section Thirty, all in Township Thirty-two South, Range Twenty-six East of the Tallahassee Meridan, in the State of Florida, and in directing that each of them be cancelled, set aside and held for naught.

7. The Court erred in holding that the Appellant has no right, title, interest or estate in said lands described in Paragraph Two of [fol. 176] said decree, and in holding said lands to be clear and free from any and all cloud or clouds thereon by reason of the certification and approval by the Secretary of the Interior, or by reason of said deed from the State Board of Education of the State of Florida to the Appellant, and in declaring the title to said lands to be in the United States of America free and clear of any right, title, interest or estate of the Appellant, or any one claiming through or under it.

8. The Court erred in requiring the Appellant to forthwith make, execute, acknowledge and deliver to the United States Attorney a good and sufficient deed, reconveying to the United States all and singular the lands described in Paragraph Two of said decree.

9. The Court erred in holding that the lands involved in the suit are most valuable for the phosphate deposits in the land.

10 The Court erred in holding that the Appellant knew, or had good reason to believe, that the lands were most valuable for phosphate deposits upon them and that they were acquired for that reason.

11. The Court erred in holding and finding that the Appellant committed a fraud upon the United States in procuring the divesting of the title of the property from the United States.

Wherefore the Appellant prays that the said opinion and decision of the Circuit Court of Appeals for the Fifth Circuit be reversed, with directions to render and enter a decree in favor of the Appellant and dismissing the Plaintiff's Bill of Complaint as amended.

(Signed) Wm. Wade Hampton, Fred J. Hampton, E. B. Hampton, Solicitors for Appellant.

[fol. 177] We acknowledge and accept service of a copy of the above and foregoing Assignment of Errors on this 3rd day of April, A. D. 1925.

(Signed) Wm. M. Gober, Harry W. Reinstine, Solicitors for Appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

STIPULATION RE ORIGINAL EXHIBITS—Filed April 6, 1925

Whereas the Appellant, Charleston, South Carolina Mining and Manufacturing Company, desires to take and enter an Appeal from the opinion and decision rendered by the Circuit Court of Appeals on the 7th of February, 1925, affirming the Opinion of the District Judge herein, and there are certain Exhibits that were transmitted to the Circuit Court of Appeals from the said District Court that cannot well be transcribed, and that it is for the best interest of all [fol. 178] parties hereto that the original Exhibits be transmitted to the Supreme Court of the United States with the transcript of the record for examination and use by the Supreme Court of the United States in the consideration and adjudication of the Appeal herein, or for the consideration by the said Court should the said cause be sent to the Supreme Court of the United States upon Writ of Certiorari:

It is therefore agreed by and between counsel for the respective parties that the said Exhibits, to-wit: Complainant's Exhibits "A" and "B" and Defendant's Exhibit "C" (being the original deed made by N. B. Broward, Governor, et als., composing the State Board of Education of the State of Florida, to the Defendant Company, dated the 8th day of February, 1908), Defendant's Exhibit "No. 4" (being photographic copies of the following papers: Certificate of B. F. Hampton, State Selecting Agent for the State of Florida, of date February 19, 1906; Certificate of B. F. Hampton, State Selecting Agent, appointing J. E. Hollingsworth as his agent to to make personal examination of the land, dated February 5, 1906; Affidavit of J. E. Hollingsworth that the land is not within six miles of a mining claim, entry or location, dated March 3, 1906; Non-Mineral Affidavit of J. E. Hollingsworth, dated March 3, 1906; List of Indemnity School Selection by B. F. Hampton, State Agent, dated February 12, 1906; Record of filing and approval of List No. 147 General Land Office, Washington, D. C.; Certificate of B. F. Hampton of the basis used in List 147, dated February 12, 1906; B-2 Certificate of Appointment of J. E. Hollingsworth by B. F. Hampton, State Selecting Agent, February 5, 1906; B-3 Affidavit J. E. Hollingsworth dated March 3, 1906; B-4 Non-Mineral Affidavit J. E. Hollingsworth dated March 3, 1906; B-5 List 148 Indemnity School Selection by B. F. Hampton, State Selecting Agent, dated February 19, 1906; B-6 Certificate List 148 U. S. Land Office; [fols. 179 & 180] C-1 Approval of List December 11, 1907; C-1½, Letter of the Commissioner certifying approval of List 31, dated December 11, 1907; C-1½ Certificate from the U. S. Land Office December 11, 1907; C-2 Approval of List 31 School Indemnity Lands; C-4 Certificate of Approval by the Commissioner of the General Land Office, December 11, 1907), be transmitted by the Clerk

of the United States Circuit Court of Appeals for the Fifth Circuit with the Transcript of Record to the Clerk of the United States Supreme Court at Washington, D. C., should the said Appeal or the said Writ of Certiorari be allowed,—to be used by counsel for the respective parties before the Court and by the Supreme Court of the United States in the consideration and adjudication of said Appeal or said Certiorari.

It is further stipulated and agreed by the parties to this suit, by their respective counsel, that the value of the property involved in this case was at the time and date of the filing of the Original Bill and at all times since said date, and is now largely in excess of One Thousand ($1,000.00) Dollars, besides cost.

This 3rd day of April, A. D. 1925.

(Signed Wm. Wade Hampton, Fred J. Hampton, Edwin B. Hampton, Attorneys of Record for Appellant. (Signed) Wm. M. Gober, Harry W. Reinstine, Attorneys of Record for Appellee.

[fol. 181] Bond on Appeal for $5,000.00—Approved and filed April 11, 1925; omitted in printing

[fol. 182] In United States Circuit Court of Appeals

[Title omitted]

Precipe for Transcript of Record—Filed April 13, 1925.

Comes now the Appellant, Charleston, South Carolina, Mining and Manufacturing Company, by its Attorneys of Record, and files this its Precipe for a Transcript of Record and other proceedings had and taken in the Circuit Court of Appeals, and requests the Clerk of the Circuit Court of Appeals for the Fifth Circuit to make up and transmit to the Supreme Court of the United States at Washington, D. C., the following, to-wit:

1. The entire printed record as heard in the Circuit Court of Appeals for the Fifth Circuit, together with all proceedings had and taken in said Circuit Court of Appeals.
2. The decision or opinion rendered in said Circuit Court of Appeals.
3. Petition for Appeal to Supreme Court of United States and Order allowing same.
4. Bond for Supersedeas.
5. Assignment of Errors.
[fol. 183] 6. Stipulation of Counsel as to original exhibits.
7. This Precipe.

(Signed) Wm. Wade Hampton, Fred J. Hampton, Edwin B. Hampton, Attorneys for Appellant

[fol. 184] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 169 to 183 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4400, wherein Charleston, South Carolina, Mining and Manufacturing Company is appellant and the United States of America is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 168 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribed my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 20th day of April, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 185] Citation—In usual form, showing service on Wm. M. Gober and Harry W. Reinstine; omitted in printing

Endorsed on cover: File No. 31,107. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 407. Charleston, South Carolina, Mining and Manufacturing Company, appellant, vs. The United States of America. Filed May 1st, 1925. File No. 31,107.

INDEX.

TABLE OF AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM 1926.

No. 93.

CHARLESTON, S. C. MINING & MANUFACTURING COMPANY,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal from a decision of the Circuit Court of Appeals for the Fifth Circuit rendered on February 7, 1925 (R. 91) affirming a decision of the District Court for the Southern District of Florida (R. 80) in a suit seeking to have cancelled the approval of the Secretary of the Interior to the selection of certain public lands by the State of Florida, which were subsequently conveyed by the State to defendant, who is the appellant in this Court. (295 F. 127)

The bill charges that the lands selected by the State contained valuable deposits of phosphate which in fact constituted its chief values which fact it is charged was at the time and prior thereto well known to the appellant. For this reason, it was further charged that the act of the appellant in procuring approval of the list under which the title of the United States to the lands involved was divested and became vested in appellant constituted a fraud upon the officers of the government.

The bill made as parties defendant the appellant and the Central Trust Company of New York who was described as having an interest under a mortgage on various lands including those involved in this suit. On May 14, 1924, on motion to dismiss the amended bill of complaint (R. 72, 73), the Court ordered that the second and third prayers of the bill be striken, thus eliminating the mortgagee as party defendant (R. 12).

Appellant in its answer (R. 5) contended that the lands thus selected by the State of Florida and acquired by it through conveyances, was not for the purpose of fraudulently obtaining title to mineral lands, but on the contrary the selection on the part of the State's Agent was made in good faith and in the usual, ordinary, customary and approved manner, and in accordance with the regulations and requirements of the Land Department of the government; that the lands thus selected by the State were vacant, unappropriated and had been continuously offered as public lands subject to homestead and scrip entry, surveyed and set apart and specifically classed as agricultural lands by the United States since the year 1879, and they had never been known other than as agricultural lands. Appellant further contended that the lands did not contain such valuable deposits of phosphate as consti-

tuted its chief value, nor are there such deposits in sufficient quantity as would justify extraction, and that it was an innocent holder for value (R. 5, 12).

Upon the dismissal of the bill as to the defendant Central Trust Company, appellant by leave of court amended the third paragraph of its answer setting forth the further defense that the grant of these lands to the State of Florida was made pursuant to the Act of Congress of March 3, 1845, (5, Stat. L. p. 788, C. 75) which statute created a compact between the State of Florida and the United States prior to the discovery of minerals in that State, and prior to any enactment in relation thereto by Congress. It was also asserted that as the grant was predicated upon a valuable consideration between the State of Florida and the United States, the State was not restricted in the selection of any lands unappropriated and not disposed of by the United States and located within the State, and that the State of Florida in this regard can not be interfered with either by any department of the government or Congress, and it was immaterial under said compact whether the lands contained phosphate deposits or not. It was also contended that the said statute became effective many years prior to the discovery of phosphate and before phosphate deposits were recognized as being mineral deposits, and that subsequent legislation by Congress can in no way defeat the legal rights of the State of Florida acquired under the Act hereinbefore referred to, or that of the appellant as grantee from the state.

THE FACTS.

Briefly stated the facts are that the State of Florida on February 19, 1906, by its Selecting Agent, filed in

the Land Office at Gainesville, Florida, Indemnity School Selection List covering certain public lands which the State had selected in lieu of school lands which had been previously disposed of. The lands involved were vacant, unappropriated, and open for homestead entry, and were offered as such on April 21, 1879, and had been on the market up to the time of the selection by the State Agent. These lands were returned as agricultural lands by the Surveyor General prior to their offering in 1879 and had not been reserved as mineral lands (R. 55-56).

The list of lands so selected by the State of Florida was approved by the Secretary of the Interior on December 11, 1907, a copy of which approval was forwarded to the Governor of the State by the Commissioner of the General Land Office on December 18, 1907 (R. 94). On February 8, 1908, the State Board of Education for the State of Florida, for valuable consideration conveyed the lands included in said indemnity School Selection List to the appellant who claims to be vested with full title thereto (R. 2, 94).

The lands so selected by the State were what are known as Indemnity School Lands made pursuant to the Act of Congress of March 3, 1845 (5 Stat. L. p. 788, chap. 75), and the provisions of Sections 2275 and 2276 of the United States Revised Statutes under which the State of Florida became entitled to certain public lands of the United States in lieu of school lands which had been lost through prior appropriation. The United States contended that the lands so selected by the State contained valuable deposits of phosphate which in fact constituted the chief value of the said lands, which fact it is charged was at the time and prior thereto well known to the appellant.

After hearing the trial court entered its decree dismissing the bill of complaint as to certain of the lands involved and further decreed that the approval of the Secretary of the Interior to the certified list of the remaining lands, issued by the Commissioner of the General Land Office, and the deed executed by the State Board of Education of the State of Florida to the appellant was null and void and cancelled, and that the appellant had no right, title or interest, or estate in the said lands. It was further decreed that the appellant forthwith execute and deliver to the United States Attorney a good and sufficient deed reconveying to the United States the lands referred to (R. p. 84). An appeal was thereupon taken to the Circuit Court of Appeals for the Fifth Circuit, which court entered judgment affirming the decision of the trial court upon the opinion of the District Judge (R. p. 91). From this decision the present appeal is being prosecuted (R. p. 91).

ASSIGNMENTS OF ERROR.

1. The Court erred in affirming the decree of the District Court for the Southern District of Florida made and rendered in this cause on the 3rd day of June, A. D., 1924.

2. The Court erred in not reversing the decision of the trial court and in failing to order the dismissal of plaintiff's amended Bill of Complaint.

3. The Court erred in holding that the State of Florida did not (fol. 175) have the right under the Act of Congress of March 3, 1845 (5 Stat. L. p. 788) to select any lands within the State that were open and unappropriated whether they did or did not contain minerals.

4. The Court erred in holding that the State of Florida was not entitled to located and select the lands involved as Indemnity school Selections under the Act of March 3, 1845 (U. S. Stat. L. Vol. 5, p. 788) known as the School Grant to the State of Florida, and under the Act of Congress of February 26, 1859, (11 Stat. L. p. 385).

5. The Court erred in granting the prayer of the bill or complaint except as to the Southeast quarter (S. E. ¼) of the Southeast quarter (S. E. ¼) of Section Thirty in Township Thirty-two South, Range Twenty-six East, as to which said tract of land the bill of complaint was dismissed.

6. The Court erred in holding to be null and void the approval of the Secretary of the Interior to the certified list of lands located by the State of Florida and issued by the Commissioner of the General Land Office, and the deed executed by the State Board of Education of the State of Florida to the appellant conveying title to said lands, towit, the East Half of the Southwest Quarter, the Northwest Quarter of the Southeast Quarter of Section Nineteen, the North Half of the Northwest Quarter and the North Half of the Southwest Quarter and the Southeast Quarter of the Southwest Quarter of Section Thirty, all in Township Thirty-two South, Range Twenty-six East of the Tallahassee Meridian, in the State of Florida, and in directing that each of them be cancelled, set aside and held for naught.

7. The Court erred in holding that the Appellant has no right, title, interest or estate in said lands described in Paragraph Two of said decree, and in holding said lands to be clear and free from any and all cloud or clouds thereon by reason of the certifica-

tion and approval by the Secretary of the Interior, or by reason of said deed from the State Board of Education of the State of Florida to the appellant, and in declaring the title to said lands to be in the United States of America free and clear of any right, title, interest or estate of the appellant, or any one claiming through or under it.

8. The Court erred in requiring the appellant to forthwith make, execute, acknowledge and deliver to the United States Attorney a good and sufficient deed, reconveying to the United States all and singular the lands described in Paragraph Two of said decree.

9. The Court erred in holding that the lands involved in the suit are most valuable for the phosphate deposits in the land.

10. The Court erred in holding that the appellant knew, or had good reason to believe, that the lands were most valuable for phosphate deposits upon them and that they were acquired for that reason.

11. The Court erred in holding and finding that the appellant committed a fraud upon the United States in procuring the divesting of the title of the property from the United States.

ARGUMENT.

I.

NO RESERVATION OF MINERAL LAND IN GRANT TO STATE.

The Act of March 3, 1845 constituting a present grant to the State of Florida of section number sixteen in every township, or other lands equivalent thereto, without restriction or reservation as to mineral lands, no such exception can now be written into the grant.

The Act of Congress of March 3, 1845, under which the State of Florida acquired the lands involved in this suit, is as follows:

> "*Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled*, That in consideration of the concessions made by the State of Florida in respect to the public lands, there be granted to the said State eight entire sections of land for the purpose of fixing their seat of Government; also, section number sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township, for the support of public schools; also, two entire townships of land, in addition to the two townships already reserved, for the use of two seminaries of learning—one to be located east, and the other west of the Suwanee River; also five per centum of the net proceeds of the sale of lands within said State, which shall be hereafter sold by Congress, after deducting all expenses incident to the same; and which said net proceeds shall be applied by said State for the purposes of education." (5 Stat. L. p. 788, c 75.)

This, we submit, constituted a binding compact between the State and the Government of the United

States which could not later be abrogated by any legislation on the part of Congress. The Act recites that it is "in consideration of the concessions made by the State of Florida in respect to the public lands" that the Federal Government granted to the State Sections sixteen in every township, or other lands equivalent thereto. Under this Statute the State was entitled to every section sixteen whether mineral or agricultural, and in case of loss the State had the specific right to select from vacant lands of the United States in that State other lands, without reference to the character of the land so selected, whether mineral or otherwise. The District Court in its opinion, which was adopted by the Circuit Court of Appeals, held that this Act was broad enough to cover mineral lands were it not for the policy of Congress as determined by various other acts, and that there is nothing in the Act of 1845 which would indicate an intention on the part of Congress to include mineral lands. A complete answer would seem to be there is nothing in the Act which indicated a purpose to exclude mineral lands.

The grant to the State of Florida was made many years prior to the discovery of phosphate and before phosphate deposits were generally recognized as mineral deposits. This we believe to be important in view of the decisions of this Court. The District Judge while expressing himself as much impressed with the contention that "The act granted to the state every sixteenth section whether mineral or agricultural and in case of loss the state had a right to select from the vacant lands of the United States other lands without reference to the character of the lands selected," stated that he was bound by the decision of this court in the case of United States v. Sweet, 245 U. S. 563, and

that the State had no right to select lands claimed to be valuable for phosphate. We think the District Judge misapprehended the scope of the decision of this Court in that case. That the Court did not go to the extent asserted by the trial judge appears from the decision of this Court in Work v. Louisiana, 269 U. S. 250, decided November 23, 1925. In that case it referred to United States v. Sweet and says that the Court had under consideration the provisions of the Utah Enabling Act of 1894, and that "the grounds of this decision were that long prior to the Act there had been established a settled policy in respect to mineral lands, evidenced by the mining laws and other statutes by which they were withheld from disposal save under laws especially including them." The Court then states that the conclusion in that case was "fortified by the further consideration that when the grant was made Utah was known to be rich in mineral and salines * * * obviously this decision does not apply to the construction of the swamp land grants made at the time when there was no settled policy as to the reservation of mineral lands, and where the other circumstances upon which the decisions were based are lacking."

The Act granting these lands to the State of Florida, we respectfully submit, materially differs from that involved in United States v. Sweet, relating to grants to the State of Utah. In the case of Florida, the grant was predicated upon a valuable consideration and there is nothing in the Act to indicate that it was restricted in the selection of any unappropriated lands, and this is fortified by the fact that there were as of that date no known minerals in the state and it was prior to the discovery of phosphate and before phosphate deposits were recognized as mineral deposits.

The Act granting these lands to the State of Florida was under consideration by the Supreme Court of Florida in State Ex Rel Kittel, v. Trustees I. I. Fund, 47 Florida, 308, 313, the court said:

> "This was a special act and grant, and was accepted by the State of Florida as a compact between said State and the Government of the United States, July 25th, 1845 (laws of Florida, 1845, ch. 14, p. 35; Thompson's Digest, pp. 4 and 5). * * *
>
> "On the admission into the Union of many of the other States land grants were made to them by Congress for public school purposes, but none of these grants, so far as we can discover, are framed in language exactly similar to the Florida grant. Some of them are reservations of public land to be granted in the future, as in Indiana and Missouri. * * * (p. 318.)
>
> "Without further burdening this opinion with citations or quotations, we are of opinion that the act of Congress of March 3, 1845, granting school lands to Florida, was in the nature of a compact between the State and the United States Government, and was a special grant *in praesenti* of every sixteenth section in every township which previous to survey had not been disposed of under legal authority from the Government of the United States, and that when by survey a sixteenth section, or fractional part thereof, is ascertained to exist in any township, the grant immediately attaches thereto without a patent, by relation back to the date of the said act of Congress." * * * (p. 323.)

In the case of Work v. Louisiana, 269 U. S. 250, there was considered the Act of 1849 granting to the State of Louisiana "The whole of those swamp and over-

flowed lands which may be or are then unfit for cultivation," and in which it was provided that upon request of the Governor, the Secretary of the Interior, was to cause an examination to be made of the lands, a list of the same was then made and certified by the deputies and Surveyor General to the Secretary who was to approve the same so far as they were not claimed or held by individuals, and on that approval, the fee simple to said lands vested in the State. The lands involved in that case were surveyed in 1871 identified and returned as swamp and overflowed lands by the survey, which were then filed and approved by the Surveyor General. At the time they were not known to contain minerals of any character. In 1910 certain of these lands were included in a petroleum withdrawal made by Presidential order. The Commissioner of the Land Office in 1919 found that they were swamp overflowed lands and held if non-mineral in character, enure to the State under its grant. He thereupon ruled that unless the State showed that the lands were non-oil and non-gas in character, its claim for the lands would be rejected. On an appeal the Secretary affirmed this decision. Upon a bill filed by the State against the Secretary of the Interior, it was charged that this requirement was unlawful, and prayed that he be enjoined from taking further action in enforcing this ruling. This court held:

> "The grants of swamp lands made by the Acts of 1849 and 1850 were in *praesenti* and gave the states an inchoate title to such lands that became perfect, as of the dates of the acts, when they had been identified as required and the legal title had passed by the approval of the Secretary under the Act of 1849 or the issuing of a patent under the

Act of 1850. This has long been the settled construction of the Act of 1850. * * *

"Each of these acts made a broad and unrestricted grant of the swamp lands. Neither contained any exception or reservation of mineral lands.

"It is urged that such a reservation should be read into the grants by reason of a settled policy of the United States of withholding mineral lands from disposal save under laws *specially* including them. There was, however, no such settled policy in 1849 and 1850 when the swamp land grants were made. Prior to that time, it is true, it had been the policy in providing for the sale of public lands, to reserve lands containing 'lead mines' and 'salt springs.' * * * Such mines and springs appeared upon the surface of the land, and were peculiarly essential to the public needs of the early communities. But there was, at that time, no established public policy of reserving mineral lands generally. * * *

"It is clear that, as there was no settled public policy in reference to the reservation of mineral lands prior to the Acts of 1849 and 1850, there is no substantial ground for reading such a reservation into the broad and unrestricted grants of swamp and overflowed lands made to the states, in *praesenti*, by these acts, especially since such lands were not then generally known to contain valuable minerals. * * *

"The policy of reserving minerals generally was not established until after the swamp land grant was made to Louisiana."

This case it would seem definitely determines the right of the appellant to the lands involved in this suit. The grant to Florida as in the grant to Louisi-

ana contained no exception or reservation of mineral lands.

In harmony with the case last cited is the case of Cooper v. Roberts, 18 How. 173, where the court had under consideration the Michigan Enabling Act of 1836, granting certain sections of the public lands to the State for the use of schools. After holding that the State held legal title to such sections when they were surveyed and marked out, the Court says:

> "The rights of private property vested in the inhabitants, ceded with Louisiana and Florida, and guaranteed to them in the Treaties of Cession, created an obstruction to the same policy within them. But the constancy with which the United States have adhered to the policy in the various compacts with the people of the newly formed States, and the care which Congress has manifested to prevent the accumulation of prior obligations which might interrupt it, fully display their estimate of its value and importance. * * * Has the discovery of minerals of value upon this section been deemed a sufficient cause for its withwithdrawal from the operation of this policy, and the compacts which develop it? * * *
>
> "These Statutes indicate a policy to withdraw from sale lands containing these minerals. But the compacts have been made without such a reservation, nor had the usage of the Land Office interpolated such an exception to the general grant of the Section No. 16 for the use of schools. * * *
>
> "The State of Michigan was admitted to the Union, with the unalterable condition 'that every section No. 16, in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools.' We

agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for the execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

On January 5, 1888, the Secretary of the Interior had under consideration in the claim of the State of Alabama (6 Land Dec. 493) the question whether certain lands reported as coal lands were open to selection by the state as indemnity lands in lieu of the sixteenth section originally granted to Alabama, or whether they have by subsequent legislation by Congress been placed beyond the operation of the Acts under which the right of Alabama to select school land arises. In holding that the State of Alabama was invested with the legal title to every sixteenth section irrespective of the character of lands, and in case of previous sale, grant or disposal the right to indemnify existed in precisely the same character of land, among other things the Secretary says:

"It is true that in the syllabus of the case [Mining Co. v. Consolidated Mining Co., 102 U. S. 167] there is found the words of general import as 'such lands' (referring to mineral lands) were by the settled policy of the government excluded from all 'grants.' But there is no such language in the decision; nor any words which imply that the

court intended to say that in all grants which the United States had previously made, mineral lands were excluded from their effect.

"Indeed, Judge Wait in the subsequent case of Mullen v. United States (118 U. S. 271) so quotes this part of that syllabus as to repel any such implication, by making it read thus: 'such lands were by the settled policy of the General Government excluded from all grants *at that time*.' These three words 'at that time' are very important in this connection. There is no doubt that it had at that time become the policy of the general government to exclude mineral lands from all grants then and thereafter made; but I repeat there is nothing in the decision to intimate that there is found in the legislation of Congress any settled policy to *repeal* grants specifically made by Congress *prior to that time*, and especially those of the character that were made by Congress to Alabama. * * * (p. 495)

"The Act of July 1, 1864, providing for the sale of tracts embracing coal lands or coal fields, continued in force until the act of March 3, 1873, (R. S. 2347-8), authorized the pre-emption and purchase of such lands in limited tracts. But the statutes, as to the other more precious metals or minerals in the public lands, continued under the limitations and restrictions of the statute of 1841 until July 26, 1866, Congress passed a general act introducing a new method of disposition of mineral lands. But the mineral lands referred to in this act were those containing the precious metals, and did not include saline land, lead or coal. Subsequently, in 1872, this language was changed, so as to apply to all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed. Pursuant to this legislation, all mineral lands were open to entry and purchase, the same as agricultural land, except under an entirely different system. * * * (p. 500).

"The fact that these lands have been reported to the General Land Office as being coal lands, does not take them out of the purview of the statute of 1819. Of course, if having been thus reported, they had been sold and disposed of before they were selected for the State, that would end the question; but having been selected before they were sold, the selection in my judgment, is operative, and gives the State the title to the lands and leaves the remaining lands to be disposed of in accordance with the laws applicable to the subject."

The foregoing authorities, it seems to us, lead to the irresistible conclusion that the grant by the Act of March 3, 1845, to the State of Florida of Section Number 16 in every township, or other lands equivalent thereto, was irrespective of the character of the land. In case of previous sale, grant or disposal of such section, the right of the State to indemnity existed in precisely the same character of land whether mineral or non-mineral. (Act Feb. 26, 1859; 11 Stat. L. 385.) The Act was in the nature of a compact between the State and Government. It was a special grant *in praesenti* of section sixteen for the support of the public schools, and when by survey the section was ascertained to exist in any township the grant immediately attached thereto. For this reason the decision of the lower court was in error and should be reversed.

II

LANDS NOT KNOWN AS MINERAL AT TIME OF GRANT OR SELECTION.

If it should be held that an exception of mineral lands could be read into the grant to the State of Florida of Section Sixteen in every township or other lands equivalent thereto, the decree of the lower court is still erroneous since they were not known to be mineral lands in 1845 or even as late as of the date of the approval of the transfer to the State by the Secretary of the Interior.

The lands involved in this suit were surveyed, segregated and classed by the government as "agricultural lands", having been first offered as such on April 21, 1879, and were continuously on the market as such for homestead entry until their selection by the State in 1906 (R. p. 56). Prior to the year 1879, all of the public lands of Florida were classed as agricultural lands (R. p. 56). On February 12, 1906, B. F. Hampton, who had been State Selecting Agent for 25 years (R. p. 56) filed the State selection of the lands here involved under Indemnity School Selection Lists No. 147 and 148, which embrace the lands described in this suit (R. pp. 2, 56, 94). The Commissioner of the General Land Office certified his approval on December 11, 1907 (R. pp. 2, 94). The Secretary of the Interior thereupon approved the selection thus made by the State of Florida, which thereby acquired legal title to the land (R. p. 2).

The bill charges that the approval and certification of these lands to the state was predicated upon a non-mineral affidavit, and that the representations made in support of the State's selections were wholely false,

fraudulent, and untrue, and were made and instigated by and on behalf of the appellant for the purpose of deceiving the officials of the Land Department, and without any belief on the part of the appellant or any one in its behalf that the said statements and representations or any part thereof were true. The bill further charges that at and prior to the time of the selection the lands contained valuable deposits of phosphate which was well known to the appellant, and their only desire to secure them was because of their value for the phosphate deposits contained therein. We think the law is well settled by this court that the lands must have been known mineral lands and must have been known to contain such quality and quantity of minerals as would render their extraction profitable and justify expenditures to that end.

Diamond Coal and Coke Co. v. United States, 233 U. S., 236, 249.

Colorado Coal and Iron Co. v. United States, 123 U. S. 307.

In the first place, it must be borne in mind that the appellant is not claiming title from the appellee, but is asserting a record title as the grantee of the State of Florida for a valuable consideration. The appellee does not allege any connection between the maker of the non-mineral affidavit and appellant or that he was the agent or employe of the appellant, nor is there any allegation of irregularity in the proceedings before the Land Office.

In the second place, it should be borne in mind that these lands were surveyed, segregated and classed as agricultural lands since 1879 and no question was raised as to their mineral character until several years after appellant acquired title.

In support of its bill, appellee produced E. K. Childers who testified that he found drift phosphate on this property and made certain borings which he stated in one sense is evidence of phosphate similar to evidence found on other lands adjoining and around that same territory, and in another sense it was not (R. p. 19). We submit that the testimony of this witness was not entitled to much consideration in view of the fact that he testified he wanted to purchase the lands and because of his ill feeling to appellant, notified the government and is trying to prevent the company from obtaining the lands because they would not let him have them (R. p. 21). He admits he never analyzed the phosphate and has no knowledge as to its quantity or quality (R. pp. 24-25). From the testimony of experts offered by the government it appears that subsequent to the filing of the bill the property had been drilled by them, that the phosphate located was of a low grade, and they had never heard of rock of this particular grade being sold and it was not marketable phosphate rock (R. pp. 27, 39, 49).

An examination of the testimony will disclose that there was an absence of surface indication of phosphate (R. pp. 30-32) and its existence had to be determined from borings made by the Government's experts many feet in depth, one witness stating that he bored from 20 to 48 feet in order to get samples (R. p. 35), and another that the lowest over-burden of this so-called deposit that he found was 9 feet and the highest he made was 32½ feet (R. p. 40).

J. J. Singleton, an employe of appellant, testified that appellant was considering the purchase of certain lands upon which there was no place to erect a plant or build houses if the same should be desired, as they

were low and swampy. In order to reach the Atlantic Coast Line Railroad from this property, it was necessary to cross these Government lands which were high and also available for the erection of buildings. For these reasons he recommended their purchase, as well as for the further fact that if outside parties should acquire them they might cause trouble through the maintenance of objectionable houses (R. p. 26). At the time neither he nor the appellant knew that these Government lands contained phosphate nor had they made any examination, and from his personal knowledge of the land now he does not think there are any paying deposits (R. pp. 26, 27), though he did locate 40 acres of Government land containing phosphate, which are the only ones he thinks, or had any reason to believe, contained phosphate. These he did not attempt to purchase and at the time of the suit were still owned by the Government (R. p. 28). Under the circumstances, he inquired of E. C. Stewart, Clerk of the Circuit Court of the County where the lands were situated if he knew how they could be secured, and was advised that they could be located with School Scrip. Singleton was not acquainted with E. F. Hampton, the State Selecting Agent, but he was well known to Mr. Stewart. At Singleton's request, Stewart applied to Hampton and the latter requested Stewart to name some person who was familiar with the land and could make a non-mineral affidavit. Thereupon Stewart suggested J. E. Hollingsworth a reputable citizen of the County, residing near and familiar with the property to make the non-mineral affidavit, which he did after going over the lands. Singleton neither knew nor had ever heard of Hollingsworth before this (R. pp. 25, 33, 56-57). The State Selecting Agent there-

upon pursued the usual and customary course as prescribed by the Land Department of the Government in securing the lands (R. pp. 56, 68-69). After the lands were acquired by the appellant it began grading for a railroad track across them (R. p. 30).

The fact that neither the State nor the Government discovered or concluded that there was any phosphate deposit upon this land until several years subsequent to the grant to the State, and inasmuch as the testimony shows that in order to locate the deposit it was necessary for appellee's engineers to make borings from 9 to 48 feet in depth and when found was of low grade and not marketable or in paying quantities, it would seem to be a conclusive answer to the claim that the lands were known to be mineral lands at the time of the filing of the non-mineral affidavit. Certainly they were not known or considered to be mineral either by the State or the Government at the time they were surveyed or at the date of the grant to the State and no such contention is made by the appellee. Indeed, we think it is a well known fact that neither at the time of the grant in 1845 nor at the time of the survey in 1879, when these lands were listed as agricultural were they known to be mineral or valuable for phosphate, nor were phosphate deposits generally recognized as mineral deposits.

In the case of Colorado Coal & Iron Co. v. United States, 123 U. S., 307, 327, the Court says:

> "We hold, therefore, that to constitute the exemption contemplated by the Preemption Act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural

purposes. The circumstances that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. *A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale.*"

We think the record shows quite conclusively that it was only because of conditions occurring subsequent to the grant to the State and by the State to appellant that the discovery was made that there was any phosphate in the lands, though as we contend, and as shown by the record, it was not marketable phosphate.

The case of Deffeback v. Hawke, 115 U. S., 392, involved the right to recover certain mineral lands situated in the Territory of Dakota, Justice Field in speaking for the Court said:

> "We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. * * * we also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion aginst the validity of titles which may be issued for other kinds of land, in which years afterwards rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the preemption laws, may be found,

years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

Thomas J. Laney, 9 Land Dec. 83, 84.
John Downs, 7 Land Dec. 71, 73.

In Davis v. Wiebold, 139 U. S. 507, Justice Field also delivered the opinion of the Court, and after reviewing certain State and Federal decisions he says:

"The exceptions of mineral lands from preemption and settlement and from grants to States for universities and schools, for the construction of public buildings and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." (p. 519).

He directs attention to the fact that there is a great uniformity of decision by the Courts of the States and of the United States on this subject and then says:

"In disposing of it (referring to a contest between a mineral and agricultural claimant), the Secretary, Mr. Teller, in a communication to the

commissioner of the General Land Office said: 'The burden of proof is therefore upon the mineral claimant, and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral and not from any theory that it may produce it; in other words, it is fact and not theory which must control your office in deciding upon the character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. He must show affirmatively, in order to establish his claim that the mineral value of the land is greater than its agricultural value.' * * * (p. 522)

"Rulings to the same effect upon applications for mineral patents are found in decisions of the Department for many years. They are that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. If mineral patents will not be issued unless the mineral exist in sufficient quantity to render the land more valuable for mining than for other purposes, which can only be known by development or exploration, it should follow that the land may be patented for other purposes if that fact does not appear." * * * (p 523)

"It would seem from this uniform construction of that department of the Government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, federal and state, whose attention has been called to the subject that the exception of mineral lands from grant in the Acts of Congress should be considered to apply only to

such lands as were at the time of the grant known to be so valuable for their minerals, as to justify expenditure for their extraction. Th grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions." (p. 524)

In the case of Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 249, the Court says:

"To justify the annulment of a homestead patent as wrongfully covered mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for minerals; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land officers. If the proofs were not false then, they cannot be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions. We say 'land *known* at the time to be *valuable* for its mineral,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable * * * We also say lands *known*

at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the preemption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon the titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

United States v. Iron Silver Min. Co., 128 U. S. 673, 683.
Dowers v. Richards, 151 U. S. 658, 663.
Shaw v. Kellog, 170 U. S. 312, 332.
United States v. Plowman, 216 U. S. 372-374.

In the case of the United States v. Iron Silver Min. Co., *supra*, this court says: "The subsequent discovery of lodes upon the grant and their successful working does not affect the good faith of the applicant, that must be determined by what was known to exist at the time."

In line with this decision is the case of United States v. Plowman *supra*, where this Court says: "The exception of mineral lands from grant in the Acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify the expenditure for their extraction."

There are many other adjudications by this Court, which would seem controlling here, but it seems only necessary to refer to the following:

Wyoming v. United States, 255, U. S., 457:

"The Land Department uniformily has ruled that the States acquire a vested right in all school sections in places which are not otherwise appropriated, and not known to be mineral, at the time they are identified by the survey, or at the date of the grant, where the survey precedes it, regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or affected by a subsequent mineral discovvery. California v. Poley 4 Copp's L. O., 18; Re Miner, 9 Land Decision, 408; Rice v. California, 24 Land Dec., 14; United States v. Morrison, 240 U. S., 192, 207, 60 L. Ed., 599, 606, 36 Sup. Ct. Rep. 326; United States v. Sweet, 245 U. S., 563, 572, 62 L. Ed., 473, 480, 38 Sup. Ct. Rep., 193. And, as respects cash entries and entries under the preemption, homestead, desert land, and kindred laws, the Land Department always has ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral, he acquires a vested right which no subsequent discovery of mineral will devest or disturb. Harnish v. Wallace, 13 L. Dec., 108; Rea v. Stephenson, 15 L. Dec., 37; Reid v. Lavellee, 26 Land Dec., 100-102; Aspen Consol. Mining Co. v. Williams, 27 Land Dec., 1, 17; Diamond Coal & Coke Co. v. United States, 233 U. S., 236, 240, 58 L. Ed., 936,939, 34 sup. Ct. Rep. 507. And this rule has been applied by that Department, although not uniformly, to selection made in lieu of relinquished lands in public reservations. Thus in Kern Oil Co. v. Clarke, 30 Land Dec. 550, where a lieu selection under the Act of June 5, 1897, Chap. 2, 30 Stat. at L. 36, 9 Fed. Stat. Anno., 2d Ed., 587, was under consideration, the Secretary of the Interior said, p. 556: 'When do rights under the selection become vested? In the disposition of the public lands of the United

States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent, once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it becomes fixed; (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necesary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occuring, can impair or in any manner affect his rights.'"

And in the more recent case of Santa Fe Pacific Ry. Co. v. Fall, 259 U. S. 197, 200:

> "It is established in the parallel cases of Payne v. Central Pacific Ry. Co., 255 U. S., 228; Payne v. New Mexico, 255 U. S., 367, and Wyoming v. United States, 255 U. S., 489,496, that the validity of the selection must be determined according to the conditions existing at the time when it was made."

In the light of the fact that these lands had been surveyed and listed by the defendant for more than thirty years as agricultural lands, and no one claimed or asserted them to be otherwise until after they were acquired by the State and deeded to the appellant, and as the existence of phosphate deposits was only determined since the suit, as a result of borings made in be-

half of the Government 9 to 48 feet in depth, their appears to be no basis for the claim that the lands were known to be valuable for their mineral deposits (if indeed it does exist in paying quantities) at the time title passed to the State.

III.

MINERALS MUST BE OF SUCH QUANTITY AND QUALITY AS WOULD RENDER EXTRACTION PROFITABLE.

Even assuming that the grant to the State of Florida excepted mineral lands, the Government should not prevail because it is shown that the phosphate deposit is not of such quality and in such quantity as would render its extraction profitable or justify its being mined.

The rule laid down by this court, as we understand, is that the mineral deposits must be of such quality and in such quantity as would render their extraction profitable and justify expenditure to that end.

Considerable testimony was taken in the trial court by the respective parties on the question of the existence of phosphate in these lands. So far as the appellant is concerned, its witnesses testified that the phosphate did not exist in quantities to justify mining operations. So far as the government is concerned, their experts testified that it was a low grade phosphate (R. p. 38, 39), and that everyone of the samples analyzed falls below the standard percentage for commercial purposes since the year 1892 (R. p. 38), one of the experts stating that he never heard of rock of this low grade being sold and he does not see how it is practicable to mine it. (R. p. 44)

Another of the Government experts testified that the rock ought to be from 70% to 73% or higher of bone

phosphate in order to make it profitable as a mining proposition (R. p. 54), while the highest percentage that he made from his tests was 66.29 (R. p. 38). The other Government expert testified that his tests ran from 62.8 to 64.87 (R. p. 39) and that the whole strata would not average 66.84 (R. p. 40). Appellant's experts testified from their knowledge of the land since the investigation and borings were made they do not think there are any paying deposits (R. p. 28) to be worth mining, it should not have an over-burden of more than 20 feet (R. p. 27), and could not be profitably mined under the present conditions (R. p. 49) and this is not denied by any witness produced by the Government. Indeed not a witness produced by the Government states it is of a quality or quantity that would justify its being mined.

As stated by Justice Field in the case of Davis v. Wiebold, 139 U. S., 507:

> "The mere fact that portions of the land contain particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land, within the meaning of the Act referred to. It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes. Any narrower construction would operate to reserve from the uses of agriculture large tracts of land which are practically useless for any other purpose and we cannot think this was the intention of Congress."

In Cutting v. Reininghaus, 7 Land Dec. 265, 267, the Secretary says:

> "To constitute mining land it must be land which it will pay to mine by the usual modes of

mining. The mere fact that portions of the land contain particles of gold would not necessarily impress it with the character of mineral land, it must at least appear that it contains metal in such quantities as to make it available and valuable for mining purposes.

"Any narrower construction would operate to reserve from the uses of agriculture large tracts of land which are practically worthless for any other purposes." (Alford v. Barnum, 40 Cal. 484)

In Magala Gold Mg. Co. v. Ferguson, 6 Land Dec. 218, 220, there was involved a controversy relating to certain lands which had been returned by the Surveyor General as agricultural in character, as to which affidavits were subsequently filed, alleging that the lands were of mineral character. The Secretary of Interior held:

"No mineral in paying quantities has been found upon the land in question, and under the repeated decision of this department, 'it must appear not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals, in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact it is mineral in character.'" (Cleghorn v. Bird and cases cited therein (4 Land Dec. 478); Commissioners of King Co. v. Alexander, *et al*, 5 Land Dec. 126)

In a decision of Secretary Vilas on January 3, 1899, involving a contest between a mineral and agricultural claimant for land returned as agricultural, (8 L. Dec. 441) he says:

"The question to be determined from this testimony is not whether the land is mineral in charac-

ter, but whether the mineral character is such as to make the land more valuable for mining than for agricultural purposes, or whether the mineral character is shown to be such as to warrant the conclusion that the minerals might be obtained with the aid of known means and appliances in sufficient quantities and of such values as to make it more profitable for mining than for agriculture.

"It cannot be questioned that the land contains minerals and that the assays of the ores taken from said mines have shown sufficient value to indicate that said land would be valuable for mining, provided ore of that value can be obtained in sufficient quantities, and extracted and worked at a sufficiently low figure. But, as already indicated, evidence on these points is wholly wanting. * * *

"In the case of Cleghorn v. Bird (4 L.D., 478) the Department said: It has been repeatedly held by the Department that it must appear, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact it is mineral in character.

"The burden of proof being on the protestants they were required to show by a preponderance of testimony that the land is more valuable for mining than for agricultural purposes as a present fact; not that it might possibly hereafter develop minerals in such quantity and of such a character, as to establish its mineral value."

We think that the record shows quite conclusively not only that there were no surface indications of the existence of phosphate, but that the phosphate rock located by the appellee since the filing of suit was from

8 to 48 feet below the surface of the earth, was of low grade and not a marketable product. We think it is also clearly shown that under the circumstances it could not be profitably mined. This being true, the case comes clearly within the decisions of this Court.

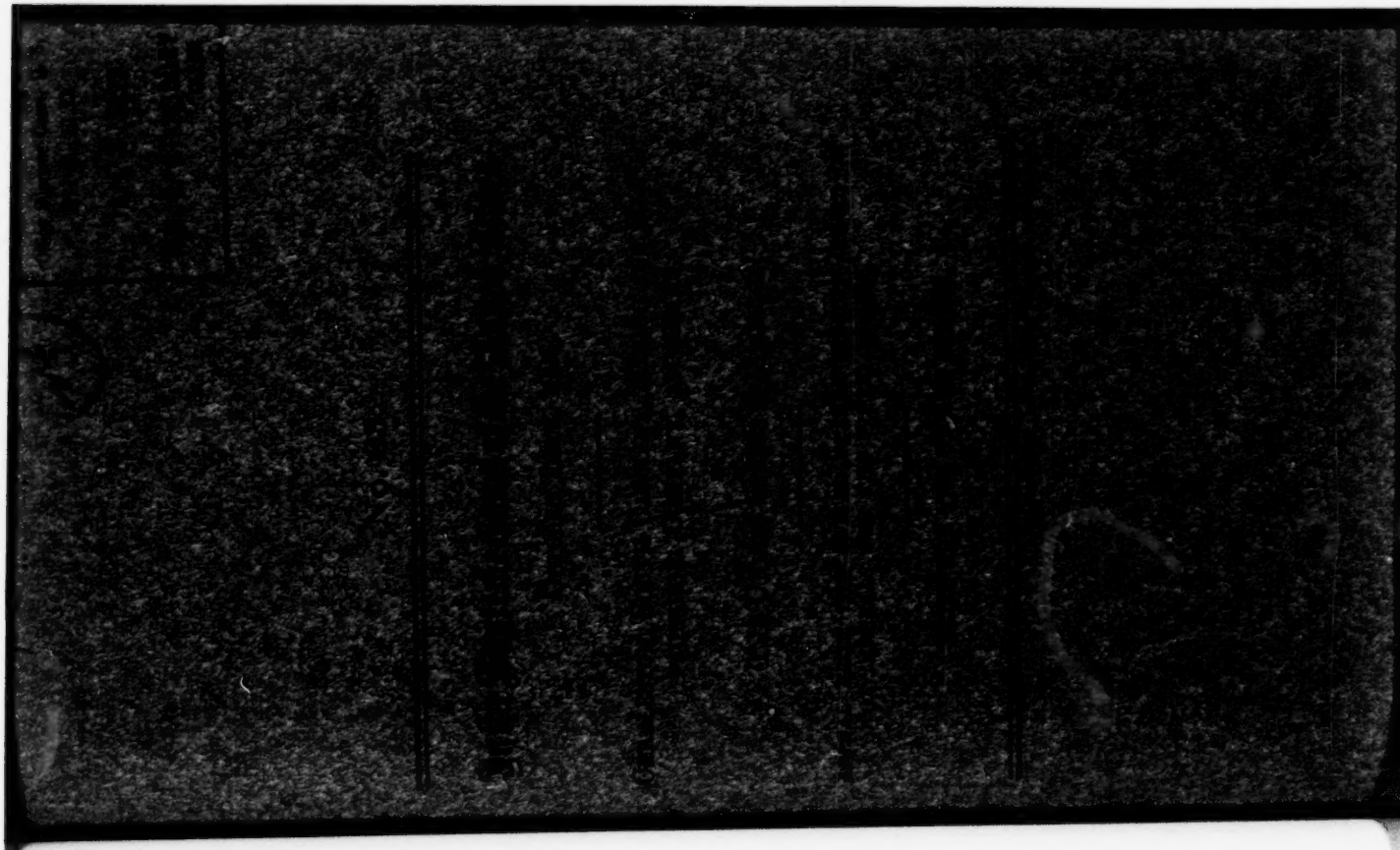
Davis v. Wiebold, 139 U. S. 507, 530.
Colorado Coal & Iron Co. v. United States, 123 U. S., 307.
Diamond Coal & Coke Co. v. United States, 233 U. S., 236, 249.

In conclusion, therefore, it is respectfully submitted that the decision of the Court below should be reversed, first, because the State had the right to select the lands irrespective of their character and whether they were mineral or non-mineral; second, the lands were not known mineral lands at the time of the selection by the State; and lastly that the phosphate found is of a low grade, not marketable, and does not exist in paying quantities.

We respectfully submit, therefore, that both the trial court as well as the Circuit Court of Appeals committed error and the decision should be reversed.

Respectfully submitted,

Edwin C. Brandenburg,
W. W. Hampton,
Fred J. Hampton,
E. B. Hampton,
Louis M. Denit,
Attorneys for Appellant



INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 93

CHARLESTON, SOUTH CAROLINA, MINING AND MANUFACTURING COMPANY, Appellant

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 80) is reported in 298 Fed. 127. The *per curiam* opinion of the Circuit Court of Appeals is found at page 91 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 7, 1925. (R. 91.) Petition for appeal was filed and allowed April 6, 1925. (R. 91, 92.) The jurisdiction of this Court rests on

Section 241 of the Judicial Code as it stood prior to the effective date of the Act of February 13, 1925.

QUESTIONS PRESENTED

The question of law is whether the grant to the State of Florida in 1845 for school purposes of "section number 16 in every township, or other lands equivalent thereto" gave to the State the right to supply deficiencies in the granted lands by selecting mineral lands known to be such at the time of selection, where the statute providing for selection of indemnity lands expressly limited the selection to lands "non-mineral in character."

The questions of fact are whether the lands here in question are mineral lands and were known to be such at the time of selection, and whether the selection and its approval were fraudulently procured by the appellants.

STATEMENT

This action was begun October 13, 1914 (R. 1), by the United States against the Charleston, S. C., Mining and Manufacturing Company to set aside a certification to the State of Florida of 320 acres of land selected by the State in lieu of school lands lost to it in place. (R. 1.)

The ground of the suit was that the lands are mineral in character, chiefly valuable for phosphate deposits (R. 2), and known to be such at the time of selection, and that the selection by the State and its approval and the subsequent conveyance by the

State to the appellant were fraudulently procured by the appellant.

By the Act of March 3, 1845, Chap. 75, 5 Stat. 788, there was granted to the State of Florida—

> section number sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township, for the support of public schools * * *.

Section 2275 of the Revised Statutes, as amended by the Act of February 28, 1891, Chap. 384, 26 Stat. 796, contains the following:

> Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen to thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State

is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

Section 2276 of the Revised Statutes, as amended by the same Act of February 28, 1891, reads as follows:

> That the lands appropriated by the preceding section shall be selected from any unappropriated surveyed public lands, *not mineral in character*, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one

> half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land: *Provided*, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships. (Italics ours.)

The lands here in question were selected by the State by lists filed February 12 and February 19, 1906, pursuant to the Act of February 28, 1891, above quoted, and the selections were supported by an affidavit that the lands were not mineral in character. The selections were approved December 11, 1907, and were certified to the State December 18, 1907, and were thereupon conveyed by the State to one who took title for the appellant (R. 51), who had procured the selection and certification.

The District Court found that 280 acres of the lands were chiefly valuable on account of the deposit of phosphates and that their character as mineral lands was known to the appellant at the time of selection, and that the selection and certification were fraudulently procured by the appellant. (R. 83.)

Early in 1906 one Singleton (R. 22), acting for and in the employ of the appellant, prospected for phosphate deposits in the vicinity of these lands. (R. 26.) He explored by boring an adjacent tract of 360 acres (R. 28, 30, 42), which, on his recommendation, was then purchased by the appellant for $40,000 (R. 47). The adjacent tract had a deposit running about 7,000 tons to the acre, with a total around 2,100,000 tons, and with a minimum overburden of 9 feet. (R. 47.) Of the 320 acres here involved, 40 acres are nonmineral, and the decree below did not touch that tract. (R. 83.) The remaining 280 acres, as the undisputed evidence shows, contain, according to borings and tests made in 1910 (some by chemists and engineers employed by the appellant) and later, phosphates running about 10,000 tons to the acre, or a total of nearly 3,000,000 tons, with a minimum overburden of about 9 feet. (R. 44.) Phosphates lie sometimes in pockets and sometimes in strata. Singleton admitted he bored the adjacent tract to within 150 feet of the tract here involved. (R. 28.) He testified he did not bore this tract. After boring the adjacent tract, he set about procuring this land for the mining company. This was done under cover. He arranged with one Stewart to make the application to the State Land Agent. (R. 25.) Stewart, in turn, procured one Hollingsworth (R. 56) to make an affidavit that the lands were nonmineral, to support the selection. Before making an affidavit, Hol-

lingsworth made a superficial inspection of the lands in company with Singleton (R. 29), but admits he thus obtained no information sufficient to disclose whether the lands contained phosphates (R. 33, 34). Appellant's evidence showed that the presence of phosphate deposits could not be determined by such an examination. (R. 31.) Singleton knew that Hollingsworth was to make this affidavit without any real knowledge as to the character of the lands. (R. 29.) Thereafter, the affidavit as to the nonmineral character of the land was made by Hollingsworth, furnished by Stewart to Hampton, the State agent, and the latter, in good faith, caused the selection to be made and approved, and the lands to be certified to the State and conveyed by the State to the appellant for $5 per acre (R. 56, 66), or a total of $1,600. (The title was taken in the name of an attorney for appellant.) (R. 51.) There was testimony by an officer of the appellant that his company did not know of phosphates on this land at the time of selection, but needed the 320 acres to "round out" its holdings. (R. 65.) Singleton claimed ignorance of the phosphate deposit and that he advised the purchase to provide a site for a plant and for employees' residences. (R. 30.) The nonmineral affidavit was admittedly false in the sense that the affiant had not, and knew he had not, any real basis for the statements in his affidavit as to the nonmineral character of the land. (R. 34.) The evi-

dence was conflicting as to whether the lands had any agricultural value (R. 58), but there was ample support for the finding that they did not (R. 45, 46). There was conflict as to whether the phosphates were of commercial value. (R. 34, 38, 39.) Some evidence showed that 68% was the commercial basis. (R. 38.) This deposit ran from 61 to 66.84 per cent. The evidence indicated that in 1904 phosphates running as low as 60% could be mined and sold at a profit. (R. 48, Exhibit E.) There was enough to support the finding that under conditions in 1906 this deposit had commercial value. There was ample evidence to justify the finding of the two lower courts that the land had little or no agricultural value and that its chief value lay in the phosphates. The conclusion is justified that this tract of 280 acres, with nearly 3,000,000 tons of phosphates, was in 1906 worth at least as much as the adjacent tract of 360 acres, having only about 2,000,000 tons, which the appellant then purchased from private interests for $40,000, although it is true that some of the phosphates on this land may have had an overburden of more than 20 feet. There was ample support for the finding that the appellant's agents knew, or had every reason to believe (R. 41), that valuable phosphate deposits were on this tract. It is certain they procured the making of a nonmineral affidavit by one who, as they knew, had himself no knowledge as to the presence or absence of phosphates.

SUMMARY OF ARGUMENT

The evidence amply supports the finding of the two courts below that the land had little or no agricultural value; that its chief value was because of the phosphate deposit; that the appellant knew of the deposit and fraudulently procured the selection and certification.

Lands in place, though mineral in character, passed under the grant if their character was unknown. It may also be assumed that lands in place passed under the grant if of known mineral character at the time of the grant. It is also the law that the selection of indemnity lands could be made from lands mineral in fact if their mineral character was not known until after selection. It does not follow that there is a right to the selection of known mineral lands as indemnity.

The grant in place was a grant *in praesenti*, but no right attaches in indemnity lands until selection. The phrase in the grant "or other lands equivalent thereto" gave no right to selection of known mineral lands and the United States was not bound to allow such selection. That the sixteenth sections might be mineral was a matter of chance. The selection of known mineral lands to replace lands that might or might not have been mineral, or that never existed because of fractional townships, would give more than the equivalent of the lands in place.

Furthermore, the provision in the grant for other lands "equivalent thereto" was not self-exe-

cuting, but required legislation to be operative. The only legislation providing for selection of the indemnity lands expressly excluded from selection mineral lands. If the statute excluding from the indemnity all mineral lands did not give the equivalent of lost granted lands, some of which may have been mineral, the courts may not supply the deficiency.

ARGUMENT

I

THE FINDINGS OF FACTS OF THE LOWER COURTS AS TO THE CHARACTER OF THE LANDS, THE KNOWLEDGE OF APPELLANT, AND THE FRAUDULENT REPRESENTATIONS ARE SUPPORTED BY THE EVIDENCE

This point is covered in part by the statement of facts but an examination of all the evidence is necessary to obtain a complete picture of the situation. Such an examination will convince that at the time of the selection these lands had a large value because of the phosphates, and that the appellant's agents knew it and caused the selection to be made and to be approved by procuring to be filed a false affidavit as to the nonmineral character of the lands. The appellant's own evidence, to the effect that the presence or absence of phosphates can not be determined by surface inspection, convicts it of knowingly procuring a false affidavit by a man who had no knowledge of the subject, because his inspection was superficial. Its claims that the appellant needed the 320 acres to "round out" an adjacent

tract of 360 acres or to supply a right of way, or as a site for plant or workmen's dwellings, or to keep off trespassers are not convincing.

II

UNDER THE FLORIDA GRANT AND THE EXECUTING STATUTES FOR SUPPLYING DEFICIENCIES IN PLACE, INDEMNITY LANDS MAY NOT BE SELECTED FROM KNOWN MINERAL LANDS

The argument of appellant confuses the question whether title to mineral lands in place passed under grant with the question as to the right to select as indemnity known mineral lands.

Neither *United States* v. *Sweet*, 245 U. S. 563, nor *Work* v. *Louisiana*, 269 U. S. 250, deals with selection of indemnity lands. In *United States* v. *Sweet* it was held that mineral lands, known to be such at the time of the school grant to Utah in 1894, did not pass under the grant in place, read in the light of other statutes and of the then settled public policy respecting mineral lands.

In *Work* v. *Louisiana* it was held that under the grant of swamp lands to Louisiana, made in 1849, mineral lands, not known to be such at the time of the grant or at the time of the identifying survey in 1871, passed under it. The reasoning of the opinion may justify the conclusion that mineral lands passed under a grant in place made as early as 1849, although known to be mineral when granted or when identified by survey.

The Florida grant of 1845 passed title to sections numbered sixteen in each township whether mineral or not, if their mineral character was not known when granted or surveyed, and it may be that *Work* v. *Louisiana* requires the conclusion that the title to sections numbered sixteen passed under the grant, though their mineral character was then known.

It is also clear that the right of selection is determined by the known conditions at the time of selection, and that a selection of lieu lands in fact mineral in character, but not known to be such when selected, is not defeated by the subsequent discovery of minerals. See *Wyoming* v. *United States*, 255 U. S. 489.

But these principles do not rule this case, and it does not follow from them that in the case of such a grant, selection of indemnity lands may be made from known mineral lands.

In the case of selected indemnity lands, no title to any specific land vests until the selection. *Barney* v. *Winona & St. Peter R. R. Co.*, 117 U. S. 228, 232.

The phrase in the Florida grant "or other lands equivalent thereto" does not mean that all lost granted lands, whether mineral or not, may be replaced by the selection of known mineral lands, and the United States was not bound thereby to allow such selections. It was a matter of chance whether any of the sixteenth sections were mineral in char-

acter. In some fractional townships these sections were missing. To construe the law as appellant urges would be to replace the mere chance of acquiring mineral lands under the grant in place, with the certainty of obtaining mineral lands by selection. The right to select known mineral lands for indemnity would give more than the equivalent of the lost granted lands which may or may not have been mineral, and some of which may never have existed because of fractional townships. Such a construction would place the State in better position than if there was no deficiency in the grant in place, by enabling it to deliberately replace all lost lands with mineral lands.

To give the exact equivalent of the lost lands would, of course, be to replace them with lands of like character or equal value, a method requiring ascertainment of the exact character and value of granted lands lost, but wholly impracticable and never attempted, and impossible where the loss results from fractional townships.

But if the grant of 1845 be construed to obligate the United States to allow selection of known mineral lands as indemnity, no right to make such a selection exists which a court may enforce.

The provision in the grant in cases of deficiency in granted lands for "other lands equivalent thereto" is not self-executing. It requires legislation to be operative. If the statute regulating selection of indemnity lands, in forbidding the selec-

tion of known mineral lands, fails to give the exact equivalent of lost granted lands, the matter is one for Congress and not for the courts.

> Courts of justice have no authority to mark out and define the land which shall be subject to the grant. [*Cooper* v. *Roberts*, 18 How. 173, 179.]

The method provided by statute for selection of indemnity lands is therefore exclusive. The statute here operative expressly forbade the selection of known mineral lands as indemnity. The provisions of this statute are not separable. If the prohibition against selection of any mineral lands denies in any case a value equivalent to that of the lost granted lands, the prohibition alone may not be disregarded. It can not be assumed that Congress would have provided for a selection without restriction, or would have given more than a just equivalent for the lands lost.

> *Santa Fe Pac. R. R. Co.* v. *Work*, 267 U. S. 511.

There is nothing in the appellant's contention based on the fact that this land was listed for disposition as agricultural land. As far back as 1866 it was provided by Section 1 of the Act of June 21, 1866, Chap. 127, 14 Stat. 66:

> *Be it enacted* * * * That from and after the passage of this act all the public lands in the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida shall be

disposed of according to the stipulations of the homestead law of twentieth May, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and the act supplemental thereto, approved twenty-first of March, eighteen hundred and sixty-four, but with this restriction, that until the expiration of two years from and after the passage of this act, no entry shall be made for more than a half-quarter section, or eighty acres; and in lieu of the sum of ten dollars required to be paid by the second section of said act, there shall be paid the sum of five dollars at the time of the issue of each patent; and that the public lands in said State shall be disposed of in no other manner after the passage of this act: *Provided,* That no distinction or discrimination shall be made in the construction or execution of this act on account of race or color: *And provided further, That no mineral lands shall be liable to entry and settlement under its provisions.* (Italics ours.)

These provisions were carried forward, in substance, in Sections 2302 and 2303 of the Revised Statutes. See Act of July 4, 1876, Chap. 165, 19 Stat. 73.

If known to be mineral it was unlawful to allow them to be selected as indemnity, and a mistake to list them as agricultural.

CONCLUSION

It seems obvious that the selections of indemnity lands by Florida must be made in accordance with the acts of Congress regulating such selections and which forbid the selection of known mineral land, and that there is no authority whatever for any other contention. If the court below gave a wrong reason for its decision, it was nevertheless right in its conclusion.

The judgment should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
B. M. PARMENTER,
Assistant Attorney General.
E. O. PATTERSON,
Solicitor Interior Department.
O. H. GRAVES,
Assistant to the Solicitor.
PERRY C. MICHENER,
Attorney.

DECEMBER, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 93.—October Term, 1926.

Charleston, South Carolina, Mining and Manufacturing Company, Appellant, *vs.* The United States of America.	Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

[February 21, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This was a bill in equity brought by the United States in the District Court for the Southern District of Florida, by direction of the Attorney General, against the Charleston, South Carolina, Mining and Manufacturing Company, to have declared void the approval and certification by the Secretary of the Interior and the Commissioner of the General Land Office of 320 acres of the public lands of the United States in Polk County, Florida, to the State of Florida, title to which was transferred by mesne conveyances from the State of Florida to defendant Mining Company. The bill averred that the selection, approval and certification had been procured from the Government Land Officials upon fraudulent representations with reference to the non-mineral character of the land, the representations having been made in an affidavit at the instance of the defendant company and with its knowledge, for the purpose of securing such conveyance to the State and through the state authorities to the defendant. The prayer was that the title or conveyance be held for naught and be delivered up and surrendered for cancellation, that the described lands be adjudged the property of the United States, and that the defendants be enjoined from setting up any claim thereto or creating any cloud upon the title of the United States, and that the possession might be restored to the United States. An answer was filed by the defendant denying the averments of the bill, and there was a full hearing upon evidence. The District Court held that the evidence of fraud was established in reference to 280 of the 320 acres described in the bill, and as to that the relief prayed for was

granted; but the bill was dismissed as to the remaining forty acres. 298 Fed. 127. On appeal of the defendant, the Circuit Court of Appeals of the Fifth Circuit affirmed the decree of the District Court. The case came to this Court on appeal taken on February 7, 1925, under section 241 of the Judicial Code, as a suit to which the United States was a party which was not made final by the other provisions of the Judiciary Title.

The evidence for the Government tended to show the following: In 1906, Singleton, acting for and in the employ of the appellant, prospected for phosphate deposits in the vicinity of these lands. He explored by making borings in a tract of 360 acres adjacent to the one in suit, which on his recommendation was purchased by the appellant for $40,000. The 280 acres here restored to the Government by the lower courts contained, according to borings and tests made in 1910, phosphates which ran from 61 to 66.84 per cent., and it appeared that at that time phosphate at 60 per cent. could be profitably mined. The land belonged to the United States. Singleton's plan was to secure the 320 acres in question as indemnity for school sections 16 conveyed by the United States to Florida under the Act of March 3, 1845, c. 75, 5 Stat. 788. Singleton arranged with one Stewart to induce the state land agent Hampton to make the selection. Stewart in turn procured one Hollingsworth to make an affidavit that the land was non-mineral. Hollingsworth made a superficial inspection of the lands in company with Singleton, but obtained no information sufficient to disclose whether the lands contained phosphates or not. Singleton knew that Hollingsworth was to make the affidavit without any real knowledge as to the character of the lands, which so far as Singleton and defendant were concerned made the affidavit false. With this affidavit, and at the instance of the defendant's agent, Hampton innocently applied to the United States to make the selection and cause the lands to be certified to the state as indemnity lands selected under statute.

There was a conflict of evidence, but the District Court found the facts as above, and that the defendant was guilty of fraud in procuring a false affidavit upon which the selection and certification of the lands were secured. The Circuit Court of Appeals sustained the finding of the lower court.

The rule is well established that this Court will not disturb a finding of fact made by a District Court in equity concurred in

by the Circuit Court of Appeals, except in case of the clearest error. *United States* v. *State Investment Company*, 264 U. S. 206, 211; *Brewer Oil Company* v. *United States*, 260 U. S. 77, 86; *Bodkin* v. *Edwards*, 255 U. S. 221, 233; *National Bank of Athens* v. *Shackelford*, 239 U. S. 81, 82; *Wright-Blodgate Company* v. *United States*, 236 U. S. 397, 402; *Washington Securities Company* v. *United States*, 234 U. S. 76, 78; *Texas & Pacific Company* v. *Louisiana Railroad Commission*, 232 U. S. 338, 339; *Chicago Junction Railway Company* v. *King*, 222 U. S. 222, 224; *Page* v. *Rogers*, 211 U. S. 575, 577; *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20, 24.

We therefore are limited in this cause to the question of law which is raised whether the indemnity selection here made was valid even if it was for known mineral land. The grant of March 3, 1845, to Florida, read as follows:

"That in consideration of the concessions made by the State of Florida in respect to the public lands, there be granted to the said state eight entire sections of land for the purpose of fixing their seat of government; also section numbered 16 in every township or other land equivalent thereto for the use of the inhabitants of such township for the support of public schools . . ."

It is said that this constitutes a binding compact between the State and the United States which can not be abrogated, and that the State was entitled to every section 16 whether mineral or agricultural, and that in case of loss the State had the specific right to select from vacant lands of the United States in that State other lands without reference to the character of the lands so selected, whether mineral or otherwise.

The District Judge expressed himself as impressed with this argument, but said that he was bound by the decision of this Court in *United States* v. *Sweet*, 245 U. S. 563, in which this Court held that under section 6 of the Utah enabling act of July 16, 1894, 28 Stat. 107, a grant of section 16 in place for school purposes, in view of the settled policy of Congress to dispose of mineral lands only under laws specially including them, was not intended to embrace lands known to be valuable for coal. It is urged that the District Judge erred in applying the *Sweet* case to the case here, because the decision of this Court in *Work* v. *Louisiana*, 269 U. S. 250, shows that the *Sweet* case did not apply to a construction of the Swamp Land Acts under grants made in 1849 and 1850.

and that if the Act enacted then contained no exception or reservation of mineral land, none was to be implied, since the policy of withholding mineral lands from disposition, except under law specially including them, was not then established.

It is to be observed that the case of *Work* v. *Louisiana* applied to a grant of swamp lands and did not refer to indemnity lands thereafter to be selected. The phrase in the original grant of 1845 in this case, "or other lands equivalent thereto" was not self-executing. It could not and did not confer on the beneficiary of the grant the right to make indemnity selections except as Congress should provide for the exercise of that right.

The only authority conferred by Congress for selection and certification of indemnity lands for a failure of the grant of a school section No. 16 applicable to the Act of 1845, is found in section 2275 of the Revised Statutes, as amended by the Act of February 28, 1891, c. 384, 26 Stat. 796, and section 2276 of the Revised Statutes, as amended by the same Act. These sections are as follows:

"Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen to thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States. Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

"Section 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated surveyed public

lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land; Provided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies for school land in fractional townships."

The lands here in question were selected by the State by lists filed on February 12 and February 19, 1906, pursuant to these sections, and the selections were supported by an affidavit that the lands were not mineral in character. They were approved December 11, 1907 and were certified to the State December 18, 1907, and were thereupon conveyed by the State to one who took title for the appellant who had procured the selection and the certification. These sections require that the indemnity lands to be conveyed thereunder shall not be mineral in character. Only Congress can convey title to the land of the United States, and it makes no difference what was its equitable obligation to convey title under the original grant of 1845 in respect of indemnity lands. Congress certainly intended to convey as indemnity lands only those described in the Act of 1891. There was no power in anyone representing the United States, therefore, to convey indemnity land which was mineral in character, and any scheme by which conveyance of such land was obtained was a fraud upon the United States.

The decree of the Circuit Court of Appeals is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.